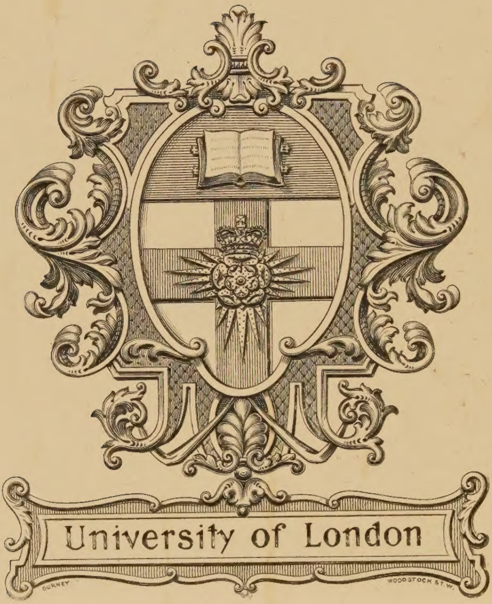
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

RE
REFERENCE ONLY

346.4
Mx. North Coll.



University of London

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-queens-bench_1914_2

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—Sir F. A. Bosanquet, K.C.
Vice-Chairman—Robert F. Norton, Esq., K.C.

EX-OFFICIO MEMBERS.

Right Hon. Sir J. A. Simon, K.C.V.O., M.P.	Attorney-General.
Sir S. O. Buckmaster, M.P. . .	Solicitor-General.

Walter Trower, Esq., President of the Law Society.

ELECTED MEMBERS.

P. Ogden Lawrence, Esq., K.C. A. R. Kirby, Esq.	Lincoln's Inn.
Sir F. A. Bosanquet, K.C. H. F. Dickens, Esq., K.C.	Inner Temple.
C. C. Scott, Esq., K.C. W. F. Hamilton, Esq., K.C.	Middle Temple.
J. C. Lewis Coward, Esq., K.C. H. E. Duke, Esq., K.C., M.P.	Gray's Inn.
Robert F. Norton, Esq., K.C., of Lincoln's Inn. E. W. Hansell, Esq., of the Inner Temple	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
W. Melmoth Walters, Esq. (Firm—Messrs. Walters & Co.). J. W. Budd, Esq. (Firm—Messrs. Budd, Johnson & Jecks).	The Law Society.

Secretary—P. Noble Fawcett, Esq., 10, Old Square, Lincoln's Inn, London, W.C.

1914.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS IN

THE COURT OF CRIMINAL APPEAL

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART.,
Barrister-at-Law.
ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

Court of Appeal	W. J. BROOKS, W. F. BARRY,	*Barristers-at-Law.*
King's Bench, Court of Criminal Appeal; Appeals from County Courts in Bankruptcy Cases, and Railway and Canal Commission Cases .	J. F. CLERK, F. O. ROBINSON, J. E. ALDOUS, W. H. GRIFFITH, J. H. WILLIAMS, J. S. HENDERSON,	*Barristers-at-Law.*
Bankruptcy Cases . . .	H. L. FRASER,	*Barrister-at-Law.*

1914.—VOL. II.

LONDON:
Printed for the Council of Law Reporting
BY BRADBURY, AGNEW, & CO. LD., OF 10, BOUVERIE STREET, E.C.,
And Published
BY THE COUNCIL AT 10, OLD SQUARE, LINCOLN'S INN, W.C.

BIBL.
LONDIN.
UNIV.

JUDGES

OF

THE COURT OF APPEAL.

1914.

Viscount Haldane, Lord Chancellor.

Lord Reading, Lord Chief Justice of England.

Sir H. H. Cozens-Hardy, Master of the Rolls.

Sir Roland Vaughan Williams, Sir H. B. Buckley, Sir W. R. Kennedy, Sir C. Swinfen Eady, Sir W. G. F. Phillimore, Sir W. Pickford,	Lords Justices of the Court of Appeal.
Sir Samuel T. Evans,	President of the Probate, Divorce and Admiralty Division.

JUDGES

OF

THE KING'S BENCH DIVISION

OF

THE HIGH COURT OF JUSTICE.

1914.

Lord Reading, Lord Chief Justice of England, President.
Sir Edward Ridley, Knt.
Sir Charles John Darling, Knt.
Sir Arthur Moseley Channell, Knt.
Sir Reginald More Bray, Knt.
Sir Alfred Tristram Lawrence, Knt.
Sir William Pickford, Knt.
Lord Coleridge.
Sir Thomas Edward Scrutton, Knt.
Sir John Eldon Bankes, Knt.
Sir Horace Edmund Avory, Knt.
Sir Thomas Gardner Horridge, Knt.
Sir Charles Montague Lush, Knt.
Sir Sidney Arthur Taylor Rowlatt, Knt.
Sir Clement Meacher Bailhache, Knt.
Sir James Richard Atkin, Knt.
Sir Montague Shearman, Knt.
Sir John Sankey, Knt.

ATTORNEY-GENERAL:

Sir J. A. Simon, Knt.

SOLICITOR-GENERAL:

Sir S. O. Buckmaster, Knt.

ERRATA.

Page	*Line*	*For*	*Read*
477	21	s. 1 of the statute of Anne.	s. 160 of the County Courts Act, 1888.
635	footnote (4)	1 Rep. pt. ii., 516.	2 Rep. 31b.
698	footnote (3)	L. R. 5 Ex. 47.	5 Ex. D. 47.
844	1	Abitrement.	Arbitrement.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1914, will be as follows:—

In the First Series,
[1914] 1 Ch. [1914] 2 Ch.

In the Second Series,
[1914] 1 K. B. [1914] 2 K. B. [1914] 3 K. B. [1914] P.

In the Third Series,
[1914] A. C.

TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Abrahams *v.* Dimmock 372
Allen *v.* Great Eastern Railway Company (C. A.) 243
—— *v.* Inland Revenue Commissioners (C. A.) 327
Allix, In re. Ex parte The Trustee 77
Art Pottery (Rubian), Dean *v.* (C. A.) 213
Associated Newspapers *v.* London Corporation (No. 1) (C. A.) 603
—————— (No. 2) 822

B.

Bailey *v.* Co-operative Wholesale Society (Insurance Section of) 233
——, Wiffen *v.* 5
Baker *v.* Ellison 762
Banks, Schuck *v.* 491
Barron, Rex *v.* (C. C. A.) 570
Battersea Corporation, Papworth *v.* 89

PAGE

Bawden, Lucy *v.* 318
Black Rock (Owners of Ship), Parker *v.* (C. A.) 39
Bonney *v.* Hoyle (Joshua) & Sons (C. A.) 257
Brand & Co., Jay's Furnishing Company *v.* 132
Branson, In re. Ex parte The Trustee 701
Bristol Corporation, Snell *v.* (C. A.) 291
British Indemnity Insurance Company, Oesterreichische Export A. G. *v.* (C. A.) 747
Brown, Jolly *v.* (C. A.) 109
Bruce, Usher's Wiltshire Brewery *v.* (C. A.) 891
Bwllfa and Merthyr Dare Steam Collieries (1891), Williams *v.* (C. A.) 30

C.

Cade, Rex *v.* (C. C. A.) 209
Churchman, Rex *v.* (C. C. A.) 386
Clarke *v.* West Ham Corporation 448

PAGE

Coal and Iron (Florence) Company, Fairbanks *v.* 461
Codling *v.* Mowlem (John) & Co. 61
Collieries (Bwllfa and Merthyr Dare Steam) (1891), Williams *v.* 30
Collieries (Wrexham and Acton), Richards *v.* Davies *v.* the Same (C. A.) 497
Collins, Drummond *v.* (C. A.) 643
Co-operative Wholesale Society (Insurance Section of), Bailey *v.* 233
Curtis, Customs and Excise Commissioners *v.* 335
Customs and Excise Commissioners *v.* Curtis 335
——————————
————, Rex *v.* (C. A.) 390

D.

David and Adlard, In re. Ex parte Whinney 694
Davies, Lewis *v.* (C. A.) 469
———, Nicholas *v.* 705
——— *v.* Wrexham and Acton Collieries (C. A.) 497
Dean *v.* Rubian Art Pottery (C. A.) 213
Debtor (No. 1 of 1914), In re A 758
Devonshire (Duke), Inland Revenue Commissioners *v.* 627
Dimmock, Abrahams *v.* 372
Director of Public Prosecutions, Scott *v.* 868
District Surveyors' Association, Holliday and Greenwood *v.* 808
Drummond *v.* Collins (C. A.) 643
Dublin and Manchester Steamship Company *v.* London and North Western Railway Company 192
Duke, New Zealand Shipping Company *v.* 682

E.

PAGE

Eastwood *v.* McNab 361
Ellis, Oelkers *v.* 139
Ellison, Baker *v.* 762
Eyjolfsson, Harper *v.* 411

F.

Fairbanks *v.* Florence Coal and Iron Company 461
Florence Coal and Iron Company, Fairbanks *v.* 461
Fuller *v.* Glyn, Mills, Currie & Co. 168
Furnishing (Jay's) Company *v.* Brand & Co. 132

G.

Galinsky, Sun Insurance Office *v.* (C. A.) 545
Gateshead Corporation *v.* Lumsden (C. A.) 883
General Hydraulic Power Company *v.* Hancock 21
Glyn, Mills, Currie & Co., Fuller *v.* 168
Godding, In re. Ex parte The Trustee 70
Gordon, Harbin *v.* (C. A.) 577
Gotobed *v.* Petchell (C. A.) 36
Great Eastern Railway Company, Allen *v.* (C. A.) 243
Great Western Railway Company, Norman *v.* 158

H.

Hammond (J. G.) & Co., Rex *v.* 866
Hancock, General Hydraulic Power Company *v.* 21
Harbin *v.* Gordon (C. A.) 577
Harper *v.* Eyjolfsson 411
Hart, Morgan *v.* (C. A.) 183
Hession *v.* Jones 421
Hill, Rex *v.* (C. C. A.) 386
Hoare & Co., Leonard *v.* 798
Holliday and Greenwood *v.* District Surveyors' Association 808

PAGE
Hoyle (Joshua) & Sons, Bonney v. (C. A.) 257
Hull and Barnsley Railway Company, Pyman Steamship Company v. 788
Hydraulic Power (General) Company v. Hancock 21

I.

Inland Revenue Commissioners, Allen v. (C. A.) 327
———————— ——— v. Devonshire (Duke) 627
———————— ———, Simpson v. 842
———————— ———, Velazquez v. 404
Insurance (British Indemnity) Company, Oesterreichische Export A. G. v. (C. A.) 747
Insurance (Sun) Office v. Galinsky (C. A.) 545

J.

Jay's Furnishing Company v. Brand & Co. 132
Jolly v. Brown (C. A.) 109
Jones, Hession v. 421
——, Peters v. 781

L.

Leonard v. Hoare & Co. 798
Lewis v. Davies (C. A.) 469
Link, Oxley v. (C. A.) 734
Linthwaite Urban Council, West Riding of Yorkshire Rivers Board v. 13
Lloyd v. Midland Railway Company (C. A.) 53
Lockett, Rex v. (C. C. A.) 720
London and North Western Railway Company, Dublin and Manchester Steamship Company v. 92

PAGE
London Corporation, Associated Newspapers v. (No. 1) (C. A.) 603
———————— ——————— (No. 2) 822
London County Council v. St. Botolph's, Bishopsgate (Churchwardens) (C. A.) 660
Lovibond (J.) & Sons, Martin v. (C. A.) 227
Lucy v. Bawden 318
Lumsden, Gateshead Corporation v. (C. A.) 883
Lydford, Rex v. (C. C. A) 378

M.

McNab, Eastwood v. 361
Makemson, Ex parte. Rex v. Newington Licensing Justices 710
Mann, Rex v. (C. C. A.) 107
Martin v. Lovibond (J.) & Sons (C. A.) 227
Mayhew v. Tripp 455
Mellor, Rex v. (C. A.) 588
Middlesbrough County Borough Council, North Riding of Yorkshire County Council v. (C. A.) 847
Midland Railway Company, Lloyd v. (C. A.) 53
Monk, Taylor v. 817
Morgan v. Hart (C. A.) 183
Mowlem (John) & Co., Codling v. 61

N.

National Amalgamated Approved Society, Taylor v. 352
Neal, In re. Ex parte The Trustee 910
Nelson v. Nelson (James) & Sons (C. A.) 770
——— (James) & Sons, Nelson v. (C. A.) 770

PAGE
New Zealand Shipping Company v. Duke 682
Newington Licensing Justices, Rex v. Ex parte Makemson 710
Newspapers (Associated) v. London Corporation (No. 1) (C. A.) 603
———————— (No. 2) 822
Nicholas v. Davies 705
Nightingale v. Parsons (C. A.) 621
Norman v. Great Western Railway Company 158
North Riding of Yorkshire County Council v. Middlesbrough County Borough Council (C. A.) 847

O.

Oelkers v. Ellis 139
Oesterreichische Export A. G. v. British Indemnity Insurance Company (C. A.) 747
Oxley v. Link (C. A.) 734

P.

Paine v. Warwick (Countess) 486
Papworth v. Battersea Corporation 89
Parker v. Black Rock (Owners of Ship) (C. A.) 39
———, Stratford-upon-Avon Corporation v. 562
Parsons, Nightingale v. (C.A.) 621
Pathé Frères, Ex parte. In re Worthington (C. A.) 299
Petchell, Gotobed v. (C. A.) 36
Peters v. Jones 781
Phillips, In re 689
Pope, Reeves v. (C. A.) 284
Port of London Authority, Rochford Rural Council v. 916
Procter v. Tarry 178
Pyman Steamship Company v. Hull and Barnsley Railway Company 788

R.

PAGE
Reeves v. Pope (C. A.) 284
Rex v. Barron (C. C. A.) 570
—— v. Cade (C. C. A.) 209
—— v. Churchman (C. C. A.) 386
—— v. Customs and Excise Commissioners (C. A.) 390
—— v. Hammond (J. G.) & Co. 866
—— v. Hill (C. C. A.) 386
—— v. Lockett (C. C. A.) 720
—— v. Lydford (C. C. A.) 378
—— v. Mann (C. C. A.) 107
—— v. Mellor (C. A.) 588
—— v. Newington Licensing Justices. Ex parte Makemson 710
—— v. Thompson (C. C. A.) 99
Richards v. Wrexham and Acton Collieries (C. A.) 497
Rochford Rural Council v. Port of London Authority 916
Roney & Co., In re (C. A.) 529
Rubian Art Pottery, Dean v. (C. A.) 213

S.

St. Botolph's, Bishopsgate (Churchwardens), London County Council v. (C. A.) 660
Schuck v. Banks 491
Scott v. Director of Public Prosecutions 868
Shaffer v. Sheffield 1
Sheffield, Shaffer v. 1
Shipping (New Zealand) Company v. Duke 682
Simpson v. Inland Revenue Commissioners 842
Skeate v. Slaters (C. A.) 429
Slaters, Skeate v. (C. A.) 429
Snell v. Bristol Corporation (C. A.) 291
Steamship (Dublin and Manchester) Company v. London and North Western Railway Company 192

PAGE

Steamship (Pyman) Company v. Hull and Barnsley Railway Company 788
Stratford-upon Avon Corporation v. Parker 562
Sun Insurance Office v. Galinsky (C. A.) 545
Sur, Walker v. (C. A.) 930

T.

Tarry, Procter v. 178
Taylor v. Monk 817
——— v. National Amalgamated Approved Society 352
Thompson, Rex v. (C. C. A.) 99
Thrower, Tydeman v. 494
Tripp, Mayhew v. 455
Tydeman v. Thrower 494

U.

Upjohn v. Willesden Urban Council (C. A.) 85
Usher's Wiltshire Brewery v. Bruce (C. A.) 891

V.

Velazquez v. Inland Revenue Commissioners 404

W.

Walker v. Sur (C. A.) 930
Wallis and Cox, Williams v. 478

PAGE

Warwick (Countess), Paine v. 486
West Ham Corporation, Clarke v. 448
West Riding of Yorkshire Rivers Board v. Linthwaite Urban Council 13
Whinney, Ex parte. In re David and Adlard 694
Wiffen v. Bailey 5
Willesden Urban Council, Upjohn v. (C. A.) 85
Williams v. Bwllfa and Merthyr Dare Steam Collieries (1891) (C. A.) 30
——— v. Wallis and Cox 478
Wiltshire (Usher's) Brewery v. Bruce (C. A.) 891
Worthington, In re. Ex parte Pathé Frères C. A. 299
Wrexham and Acton Collieries, Richards v. Davies v. the Same (C. A.) 497

Y.

Yorkshire (North Riding) County Council v. Middlesbrough County Borough Council (C. A.) 847
Yorkshire (West Riding) Rivers Board v. Linthwaite Urban Council 13

TABLE OF CASES CITED

A.

		PAGE
Addison *v.* Gray	2 Wils. 293	844
Allan, In re	17 Ch. D. 807	652
Allcock *v.* Hall	[1891] 1 Q. B. 444	429
Allen *v.* Anthony	1 Mer. 282	286
——— *v.* James	3 Com. Cas. 10	791
Allum *v.* Dickinson	9 Q. B. D. 632	422
Alton *v.* Harrison	L. R. 4 Ch. 622	698
Angerstein, In re	L. R. 9 Ch. 479	703
Anlaby *v.* Prætorius	20 Q. B. D. 764	736
Anthony *v.* Haney	8 Bing. 186	137
Armitage *v.* Parsons	[1908] 2 K. B. 410	736
Armstrong *v.* Armstrong	3 My. & K. 45	313
Ash *v.* Nicholl	[1905] 1 K. B. 139	612, 828
Ashby's Cobham Brewery Company's Case	[1906] 2 K. B. 754	181
Ashley's Case	L. R. 9 Eq. 263	144
Associated Newspapers *v.* London Corporation (No. 1)	[1914] 2 K. B. 603	830
Attenborough *v.* London and St. Katherine's Dock Company	3 C. P. D. 450	550
Attorney-General *v.* Dorking Union	20 Ch. D. 595	921
——————— *v.* Hope	2 Cl. & F. 84	406
——————— *v.* Sillem	10 H. L. C. 704	479
Austin, In re	10 Ch. D. 434	703
——— *v.* Manchester, Sheffield and Lincolnshire Railway Company	10 C. B. 454	791

B.

Banks *v.* Hollingsworth	[1893] 1 Q. B. 442	596
Barclay *v.* Pearson	[1893] 2 Ch. 154	873
——— *v.* Stirling	5 M. & S. 6	685
Bargrave *v.* Atkins	3 Lev. 413	844
Barnett *v.* Eccles Corporation	[1900] 2 Q. B. 423	8
——— *v.* Port of London Authority	[1913] 2 K. B. 115	293
Barnhart *v.* Greenshields	9 Moo. P. C. 18	285
Baron *v.* Portslade Urban Council	[1900] 2 Q. B. 588	93
Barrack *v.* M'Culloch	3 K. & J. 110	783
Barraclough *v.* Brown	[1897] A. C. 615	355
Barry's Trusts, In re	[1906] 1 Ch. 768; [1906] 2 Ch. 358	886
Bastable *v.* Little	[1907] 1 K. B. 59	767
Baxendale and Great Western Railway Company, In re	5 C. B. (N.S.) 336	196

		PAGE
Baxendale and North Devon Railway Company, In re	3 C. B. (N.S.) 324	196
Baxter *v.* Burfield	2 Str. 1266	305
Beale *v.* Beale	Rolle's Abr., Arbitrement (H.) 14	844
Beamish *v.* Beamish	9 H. L. C. 274	898
Bearn, The	[1906] P. 48	790
Bebb *v.* Bunny	1 K. & J. 216	886
Bell *v.* Bassett	52 L. J. (Q.B.) 22	669
Bentinck *v.* London Joint Stock Bank	[1893] 2 Ch. 120	173
Best *v.* Hayes	1 H. & C. 718	550
Bettisworth's Case	2 Rep. 31b	635
Betts *v.* Stevens	[1910] 1 K. B. 1	767
Biggart *v.* Minnesota (Owners of S.S.)	5 B. W. C. C. 68	229
Birkett *v.* Birkett	98 L. T. 540	783
Blackmore *v.* Mile End Old Town Vestry	9 Q. B. D. 451	90
Blades *v.* Lawrence	L. R. 9 Q. B. 374	597
Blakiston *v.* Cooper	[1909] A. C. 104	651
Blue *v.* West Kilbride Free Gardeners' Society	4 M. 1042	355
Bluett *v.* Stutchburys	24 Times L. R. 469	773
Blyth and Fanshawe, In re	10 Q. B. D. 207	534
—— *v.* Hulton	72 J. P. 401	868
Board of Education *v.* Rice	[1911] A. C. 179	396
Boldero *v.* London and Westminster Loan and Discount Company	5 Ex. D. 47	81, 698
Bond *v.* Plumb	[1894] 1 Q. B. 169	820
Booth *v.* New Afrikander Gold Mining Company	[1903] 1 Ch. 295	307
—— *v.* Warrington (Earl)	4 Bro. P. C. 163	144
Boschoek Proprietary Company *v.* Fuke	[1906] 1 Ch. 148	779
Brandy *v.* Raphael (Owners of S.S.)	[1911] 1 K. B. 376; [1911] A. C. 413	56
Brickwood & Co. *v.* Reynolds	[1898] 1 Q. B. 95	891
Bridgwater Trustees *v.* Bootle-cum-Linacre	L. R. 2 Q. B. 4	613
Broad and Broad, In re	15 Q. B. D. 252, 420	534
Brooke *v.* Champernowne	4 Cl. & F. 589	331
—— (Benjamin) & Co. *v.* Inland Revenue Commissioners	[1896] 2 Q. B. 356	406
Brown *v.* Dean	[1910] A. C. 373	453
—— *v.* Dunstable Corporation	[1899] 2 Ch. 378	920
Bryant *v.* North Metropolitan Tramways Company	6 Times L. R. 396	445, 449
Buckley *v.* Gross	3 B. & S. 566	489
Bulli Coal Mining Company *v.* Osborne	[1899] A. C. 351	139
Bunbury *v.* Fuller	9 Ex. 111	594
Burkill *v.* Thomas	[1892] 1 Q. B. 99, 312	595
Burns *v.* Baird (William) & Co.	6 B. W. C. C. 362	269
Burns-Burns *v.* Brown	[1895] 1 Q. B. 324	72
Burton *v.* Companies Registration Agency	23 Times L. R. 151, 337	374, 375
Busfield, In re	32 Ch. D. 123	933
Butler *v.* Knight	L. R. 2 Ex. 109	759
Butterworth *v.* West Riding of Yorkshire Rivers Board	[1909] A. C. 45	15

C.

		PAGE
Calder *v.* Dobell	L. R. 6 C. P. 486	66
Calico Printers Association *v.* Booth	[1913] 3 K. B. 652	37
Calvert *v.* Scinde Railway Company	18 C. B. (N.S.) 306	580
Cameron *v.* Young	[1908] A. C. 176	321
Carey, In re	[1895] 2 Q. B. 624	697
Carter *v.* Lang	1 B. W. C. C. 379	297
Castle Steam Trawlers *v.* Great Western Railway Company	13 Ry. & Ca. Tr. Cas. 145	198
Castro *v.* Reg.	6 App. Cas. 229	100
Catt *v.* Wood	[1910] A. C. 404	237
Cavalier *v.* Pope	[1905] 2 K. B. 757; [1906] A. C. 428	320
Chaplin, Ex parte	26 Ch. D. 319	697
Charing Cross, Euston and Hampstead Railway Company *v.* Boots	[1909] 2 K. B. 640	32
Chartered Bank of India *v.* British India Steam Navigation Company	[1909] A. C. 369	790
Churchward *v.* Coleman	L. R. 2 Q. B. 18	589
City of Dublin Steam Packet Company *v.* London and North Western Railway Company	4 Ry. & Ca. Tr. Cas. 10	199
Clark *v.* Molyneux	3 Q. B. D. 237	446
Clarke *v.* Dickson	E. B. & E. 148	144
——— *v.* West Ham Corporation	[1909] 2 K. B. 858	766
Clarkson *v.* Musgrave	9 Q. B. D. 386	359
Clouston & Co. *v.* Corry	[1906] A. C. 122	439
Cochrane *v.* O'Brien	2 J. & Lat. 380	549
Cockayne *v.* Harrison	L. R. 13 Eq. 432	487
Cogdon *v.* Sunderland Gas Company	1 B. W. C. C. 156	229
Collins *v.* Blantern	1 Sm. L. C., 11th ed. p. 385	308
Colonial Bank *v.* Cady	15 App Cas. 267	168
Colquhoun *v.* Brooks	14 App. Cas. 493	650
Colwill *v.* Reeves	2 Camp. 575	488
Commissioner of Stamps *v.* Hope	[1891] A. C. 476	405
Compañhia Sansinena de Carnes Congeladas *v.* Houlder Brothers & Co.	[1910] 2 K. B. 354	750
Connecticut Fire Insurance Company *v.* Kavanagh	[1892] A. C. 473	356
Cooper, In re	[1911] 2 K. B. 550	886
Cowley *v.* Newmarket Local Board	[1892] A. C. 345	90
Cox *v.* Hickman	8 H. L. C. 268	414
—— *v.* Leigh	L. R. 9 Q. B. 333	469
Craven's Mortgage, In re	[1907] 2 Ch. 448	886
Crawford *v.* Fisher	1 Hare, 436	549
Crawshay *v.* Thornton	2 My. & Cr. 1	550
Cremins *v.* Guest, Keen & Nettlefolds	[1908] 1 K. B. 469	43
Cribb *v.* Kynoch (No. 2)	[1908] 2 K. B. 551	67
Curtis *v.* Stovin	22 Q. B. D. 513	595
——— *v.* Williamson	L. R. 10 Q. B. 57	66

D.

Daniels *v.* Davison	16 Ves. 249	286
Danubian Sugar Factories *v.* Inland Revenue Commissioners	[1901] 1 K. B. 245	404
Davis *v* Burrell	10 C. B. 821	368
—— *v.* Stephenson	24 Q. B. D. 529	820

		PAGE
D'Este's Settlement Trusts, In re	[1903] 1 Ch. 898	651
Delano, The	[1895] P. 40	480
Devitt *v.* Bainbridge (Owners of S.S.)	[1909] 2 K. B. 802	262
Di Sora *v* Phillips	10 H. L. C. 624	652
Dixon *v.* Ambient (Owners of S.S.)	1 W. C. Rep. 224	43
—— *v.* Patton	120 L. T. Journ. 170	37
Dobson *v.* Horsley	30 Times L. R. 148	320
Doe *v.* Stanion	1 M. & W. 695	330
Donkin *v.* Pearson	[1911] 2 K. B. 412	596
Donovan *v.* Laing, Wharton and Down Construction Syndicate	[1893] 1 Q. B. 629	504
Dowden & Pook *v.* Pook	[1904] 1 K. B. 45	374
Dublin, Wicklow and Wexford Railway Company *v.* Slattery	3 App. Cas. 1155	162
Duncan's Executors *v.* Farmer	5 Tax Cases, 417	652

E.

Earl *v.* Lubbock	[1905] 1 K. B. 253	326
East London Railway Company *v.* Thames Conservators	48 Sol. J. 492	533
Eastland *v.* Burchall	3 Q. B. D. 432	445
Eddington *v.* Borman	4 T. R. 4	611
Edwards *v.* Godfrey	[1899] 2 Q. B. 333	67
———— & Co. *v.* Picard	[1909] 2 K. B. 903	184
Eley *v.* Positive Assurance Company	1 Ex. D. 20, 88	773
Ellis *v.* Bedford (Duke)	[1901] A. C. 1	933
Elton, The	[1891] P. 265	751
Engelhart *v.* Farrant	[1897] 1 Q. B. 240	162
Everitt *v.* Eastaff & Co.	6 B. W. C. C. 184	229
Everth *v.* Smith	2 M. & S. 278	685

F.

Fairclough *v.* Marshall	4 Ex. D. 37	331
Falcke *v.* Scottish Imperial Insurance Company	34 Ch. D. 234	691
Farmer *v.* London and North Western Railway Company	20 Q. B. D. 788	611
Farr *v.* Ward	2 M. & W. 844	549
Figg *v.* Moore Brothers	[1894] 2 Q. B. 690	72
Filburn *v.* People's Palace and Aquarium Company	25 Q. B. D. 258	162
Firth, Ex parte	19 Ch. D. 419	356
Fitzpatrick *v.* Evans & Co.	[1901] 1 K. B. 756; [1902] 1 K. B. 505	503
Fletcher *v.* Duchess (Owners of Ship)	[1911] A. C. 671	229
———— *v.* Nokes	[1897] 1 Ch. 271	114
Flower *v.* Lloyd	6 Ch. D. 297	423
Ford, In re	[1900] 1 Q. B. 264	72
Forfarshire, The	[1908] P. 329	790
Fox *v.* Smith	2 Wils. 267	844
France *v.* Clark	26 Ch. D. 257	171
Francis *v.* Cockrell	L. R. 5 Q. B. 501	159
Frankenburg *v.* Great Horseless Carriage Company	[1900] 1 Q. B. 504	752
Freemasons' Arms, In re	72 J. P. 323	908
Fry *v.* Smellie	[1912] 3 K. B. 282	173
Fulham Parish *v.* Woolwich Union	[1907] A. C. 255	673
Furber *v.* Sturmey	3 H. & N. 521	597

G.

		PAGE
Gage *v.* Collins	L. R. 2 C. P. 381	597
Galbraith *v.* Dicksee	102 L. T. 890; 74 J. P. 348	807
Galileo, The	[1914] P. 9	794
Gallin *v.* London and North Western Railway Company	L. R. 10 Q. B. 212	791
Galloway *v.* London Corporation	L. R. 4 Eq. 90	415
Gane *v.* Norton Hill Colliery Company	[1909] 2 K. B. 539	901
Gant *v.* Hobbs	[1912] 1 Ch. 717	307
General Furnishing and Upholstering Company *v.* Venn	32 L. J. (Ex.) 220	78
Gibbs *v.* Guild	9 Q. B. D. 59	139
Gibson *v.* Bradford	4 E. & B. 586	686
Gilbert *v.* Nizam (Owners of Steam Trawler)	[1910] 2 K. B. 555	42, 229
Gillatt & Watts *v.* Colquhoun	2 Tax Cases, 76	898
Gillow & Co. *v.* Aberdare (Lord)	9 Times L. R. 12	623
Gisborne *v.* Gisborne	2 App. Cas. 300	651
Glossop *v.* Heston and Isleworth Local Board	12 Ch. D. 102	921
Goldburg, In re	[1912] 1 K. B. 384	697
Gonville's Trustee *v.* Patent Caramel Company	[1912] 1 K. B. 599	697
Gorely, Ex parte	4 D. J. & S. 477	548
Goslings *v.* Blake	23 Q. B. D. 324	885
Great Southern and Western Railway Company of Ireland *v.* Dublin and South Eastern Railway Company	13 Ry. & Ca. Tr. Cas. 176	197
Greatorex *v.* Shackle	[1895] 2 Q. B. 249	549
Green *v.* Reinberg	104 L. T. 149	286
——— *v.* Royal Exchange Assurance Company	6 Taunt. 68	685
Gregory *v.* Torquay Corporation	[1912] 1 K. B. 442	356
Griffith *v.* Tower Publishing Company	[1897] 1 Ch. 21	313
Grosvenor *v.* Hampstead Junction Railway Company	1 De G. & J. 446	635
Grote *v.* Chester and Holyhead Railway Company	2 Ex. 251	159
Grove, In re	4 Times L. R. 272	422
Groves *v.* Wright	2 K. & J. 347	487
Guest, Keen & Nettlefolds *v.* Fowler	[1910] 1 K. B. 713	899
Guthrie *v.* Walrond	22 Ch. D. 573	406

H.

		PAGE
Hackney Furnishing Company *v.* Watts	[1912] 3 K. B. 225	134
Hadley & Son *v.* Beedom	[1895] 1 Q. B. 646	81
Hall, In re	[1907] 1 K. B. 875	690
—— *v.* Cox	[1899] 1 Q. B. 198	871
—— *v.* McWilliam	85 L. T. 239	871
Hamilton *v.* Johnson	5 Q. B. D. 263	445
——— *v.* Long	[1903] 2 I. R. 407; [1905] 2 I. R. 552	782
Harding *v.* Royal Mail Steam Packet Company	4 B. W. C. C. 59	261
Hargroves, Aronson & Co. *v.* Hartopp	[1905] 1 K. B. 472	320
Harris, In re	14 Man. 127	694

		PAGE
Harris *v.* Beauchamp Brothers	[1894] 1 Q. B. 801	183
Haworth *v.* Andrew Knowles & Sons	19 Times L. R. 658	243
Heard *v.* Pickthorne	[1913] 3 K. B. 299	233
Heaven *v.* Pender	11 Q. B. D. 503	320
Hebert *v.* Royal Society of Medicine	56 Sol. J. 107	532
Hedges *v.* Preston	80 L. T. 847	81
Hellwig *v.* Mitchell	[1910] 1 K. B. 609	7
Herbert *v.* McQuade	[1902] 2 K. B. 631	651
Hewitt *v.* Hewitt	1 Q. B. 110	843
Higgs and Hill *v.* Stepney Borough Council	[1914] 1 K. B. 505	812
Hill *v.* Curtis	L. R. 1 Eq. 90	564
Hirth, In re	[1899] 1 Q. B. 612	697
Hogg, In re	14 Times L. R. 210	237
Holborn Union *v.* St. Leonard, Shoreditch (Vestry)	2 Q. B. D. 145	93
Holcroft's Case	4 Rep. 46b	572
Holdsworth *v.* Wilson	4 B. & S. 1	844
Holmes *v.* Millage	[1893] 1 Q. B. 551	184
Hooley, In re	79 L. T. 706	866
Horn *v.* Henry Faulder & Co.	99 L. T. 524	774
How *v.* London and North Western Railway Company	[1892] 1 Q. B. 391	449
Howarth *v.* Samuelson (Sir B.) & Co.	104 L. T. 907	262
Howes *v.* Barber	18 Q. B. 588	580
Huggett *v.* Miers	[1908] 2 K. B. 278	318

I.

Imperial Hydropathic Hotel Company, Blackpool *v.* Hampson	23 Ch. D. 1	774
Indermaur *v.* Dames	L. R. 1 C. P. 274; L. R. 2 C. P. 311	155, 320
Ingham *v.* Walker	3 Times L. R. 448	549
Inland Revenue Commissioners *v.* Muller & Co.'s Margarine	[1900] 1 Q. B. 310; [1901] A. C. 217	404, 407
——— *v.* Truman, Hanbury, Buxton & Co.	[1913] A. C. 650	180, 394
Irwin *v.* Dearman	11 East, 23	782
Isaacson *v.* New Grand (Clapham Junction)	[1903] 1 K. B. 539	67
Islington Corporation *v.* London School Board	[1902] 2 K. B. 701; [1903] 2 K. B. 354	611, 828

J.

James, Ex parte	L. R. 9 Ch. 609	690
——— *v.* Ricknell	20 Q. B. D. 164	759
Jenkins, In re	90 L. T. 65; 20 Times L. R. 187	70
Johnson *v.* Lindsay & Co.	[1891] A. C. 371	504
Johnston *v.* Mew, Langton & Co.	98 L. T. 517	260
Jones *v.* Llanrwst Urban Council	[1911] 1 Ch. 393	532
——— *v.* Smith	1 Hare, 43	288
Joyce *v.* Kennard	L. R. 7 Q. B. 78	685
Jury *v.* Atlanta (Owners of Steamship)	[1912] 2 K. B. 366	297
Juson *v.* Dixon	1 M. & S. 601	368

K.

		PAGE
Kearney *v.* Whitehaven Colliery Company	[1893] 1 Q. B. 700	307
Keighley, Maxsted & Co. and Durant & Co., In re	[1893] 1 Q. B. 405	844
Kendall *v.* Hamilton	4 App. Cas. 504	67
Kirkheaton Local Board *v.* Ainley	[1892] 2 Q. B. 274	15, 916
——— and Stockton and Middlesbrough Water Board, In re	[1893] 1 Q. B. 375	853
Kirkwood *v.* Gadd	[1910] A. C. 422	3
Kitchenham *v.* Johannesburg (Owners of S.S.)	[1911] 1 K. B. 523; [1911] A. C. 417	42, 229
Knight and Tabernacle Permanent Building Society, In re	[1892] 2 Q. B. 613	853
Knox *v.* Gye	L. R. 5 H. L. 656	143

L.

Laceby *v.* Lacon & Co.	[1899] A. C. 222	340, 396
Lane *v.* Cox	[1897] 1 Q. B. 415	321
Lassells & Sharman, In re	72 J. P. 323	908
Latham *v.* R. Johnson and Nephew	[1913] 1 K. B. 398	155
Lax *v.* Darlington Corporation	5 Ex. D. 28	157
Le Brasseur and Oakley, In re	[1896] 2 Ch. 487	584
Lee *v.* Sangster	2 C. B. (N.S.) 1	702
Leslie, In re	23 Ch. D. 552	691
Levers *v.* Midland Railway Company	13 Ry. & Ca. Tr. Cas. 301	198
Liverpool Corn Traders' Association *v.* Great Western Railway Company	8 Ry. & Ca. Tr. Cas. 114	198
Lloyd *v.* Guibert	L. R. 1 Q. B. 115	651
Logan *v.* Davis	104 L. T. 914	773
London Corporation *v.* Cox	L. R. 2 H. L. 239	595
——— *v.* Netherlands Steamboat Company	[1906] A. C. 263	604, 829
London County Council *v.* Attorney-General	[1901] A. C. 26	652
——— *v.* District Surveyors Association	[1909] 2 K. B. 138	807
London Joint Stock Bank *v.* Simmons	[1892] A. C. 201	168
London, Tilbury and Southend Railway Company *v.* Paterson	29 Times L. R. 413	164
Longmore *v.* Great Western Railway Company	19 C. B. (N.S.) 183; 35 L. J. (C.P.) 135	156
Lovegrove *v.* White	L. R. 6 C. P. 440	759
Low *v.* General Steam Fishing Company	[1909] A. C. 523	229
Lowery *v.* Walker	[1910] 1 K. B. 173; [1911] A. C. 10	155
Lysaght *v.* Edwards	2 Ch. D. 499	332
Lysons *v.* Andrew Knowles & Sons	[1901] A. C. 79	508

M.

McCabe *v.* Henry North & Sons	6 B. W. C. C. 504	229
McCannon *v.* Sinclair	2 E. & E. 53	613
M'Clean *v.* Great Southern and Western Railway Company	42 I. L. T. 239	767

		PAGE
Perkins *v.* Dangerfield	[1879] W. N. 172	432
—— *v.* London and North Western Railway Company	1 Ry. & Ca. Tr. Cas. 327	197
Perry *v.* Wright	[1908] 1 K. B. 441	292
Peters *v.* Perry	10 Times L. R. 366	429
Phillips *v.* Beal	32 Beav. 25	488
—— *v.* Vickers, Sons & Maxim	[1912] 1 K. B. 16	261
Phillipson *v.* Hayter	L. R. 6 C. P. 38	783
Phipps *v.* Ingram	3 Dowl. 669	480
—— *v.* London and North Western Railway Company	[1892] 2 Q. B. 229	198
Pictou Municipality *v.* Geldert	[1893] A. C. 524	93
Pierce *v.* Provident Clothing and Supply Company	[1911] 1 K. B. 997	229
Piggott *v.* Middlesex County Council	[1909] 1 Ch. 134	114
Plews *v.* Samuel	[1904] 1 Ch. 464	331
Pole *v.* Bright	[1892] 1 Q. B. 603	449
Pollock, In re	87 L. T. 238	70
Poole Corporation *v.* Bournemouth Corporation	75 J. P. 13	887
Popple *v.* Frodingham Iron and Steel Company	[1912] 2 K. B. 141	262
Powell *v.* Kempton Park Racecourse Company	[1897] 2 Q. B. 242; [1899] A. C. 143	819
—— *v.* Main Colliery Company	[1900] 2 Q. B. 145	268
Poynting *v.* Faulkner	5 Tax Cases, 145	651
Prentice *v.* London	L. R. 10 C. P. 679	355
Preston Banking Company *v.* Allsup (William) & Sons	[1895] 1 Ch. 141	423
Prestwich *v.* Poley	18 C. B. (N.S.) 806	759
Price, In re	[1900] 1 Ch. 442	651
—— *v.* Union Lighterage Company	[1903] 1 K. B. 750	793

Q.

Quartz Hill Gold Mining Company *v.* Eyre	11 Q. B. D. 674	6
Queensland Mercantile and Agency Company, In re	[1891] 1 Ch. 536	406
Quin *v.* Salmon	[1909] 1 Ch. 311; [1909] A. C. 442	773

R.

Randle *v.* Clay Cross Company	[1913] 3 K. B. 795	466
Rayson *v.* South London Tramways Company	[1893] 2 Q. B. 304	5
Reg. *v.* Bowen	1 Den. C. C. 22	102
—— *v.* Brettel	Car. & M. 609	572
—— *v.* Brown	[1895] 1 Q. B. 119	820
—— *v.* Burgess	L. & C. 258	107
—— *v.* Crewkerne Licensing Justices	21 Q. B. D. 85	340
—— *v.* De Salvi	46 Cent. Cr. Ct. Sess. Papers, 884; 10 Cox, C. C. 481, n.	572
—— *v.* Devett	8 C. & P. 639	102
—— *v.* Drury	3 Car. & K. 193	572

		PAGE
Reg. *v.* Edmondes	59 J. P. 776	101
—— *v.* Elrington	1 B. & S. 688	573
—— *v.* Gilmore	15 Cox, C. C. 85	572
—— *v.* Goldsmith	L. R. 2 C. C. R. 74	100
—— *v.* Grimwood	60 J. P. 809	573
—— *v.* Heane	4 B. & S. 947	100
—— *v.* Heywood	9 Cox, C. C. 479	726
—— *v.* Judge of City of London Court	[1891] 2 Q. B. 71	595
—— *v.* Judge of Marylebone County Court	50 L. T. 97	593
—— *v.* King	[1897] 1 Q. B. 214; 66 L. J. (Q.B.) 87	570, 575
—— *v.* Liverpool Recorder	20 L. J. (M.C.) 516	395
—— *v.* Middlesex Justices	2 Q. B. D. 516	395
—— *v.* Miles	24 Q. B. D. 423	571
—— *v.* ——	3 Cr. App. Rep. 13	572
—— *v.* Mitchel	6 St. Tr. (N.S.) 599	727
—— *v.* Musson	8 E. & B. 900	613
—— *v.* O'Brien	15 Cox, C. C. 29	572
—— *v.* O'Connell	5 St. Tr. (N.S.) 2	727
—— *v.* Ollis	[1900] 2 Q. B. 758	571
—— *v.* Philpotts	1 Car. & K. 112	101
—— *v.* Riley	[1896] 1 Q. B. 309	209
—— *v.* St. Marylebone Vestry	[1895] 1 Q. B. 771	669
—— *v.* St. Matthew, Bethnal Green (Churchwardens)	50 L. T. 65; 53 L. T. 634	669, 670
—— *v.* Staines Local Board	60 L. T. 261	916
—— *v.* Strange	8 C. & P. 172	727
—— *v.* Tancock	13 Cox, C. C. 217	572
—— *v.* Whitchurch	7 Q. B. D. 534	8
Rendall *v.* Andrew	61 L. J. (Q.B.) 630	564
Renton *v.* King	21 Times L. R. 577	356
Rex *v.* Benfield	2 Burr. 980	731
—— *v.* Blackson	8 C. & P. 43	731
—— *v.* Blanshard	13 Q. B. 318	395
—— *v.* Chandler	1 Salk. 378; 1 Ld. Raym. 581	101
—— *v.* Clark	1 Brod. & B. 473	571
—— *v.* Cohen	3 Cr. App. Rep. 180	101
—— *v.* Coogan	1 Leach, 449	210
—— *v.* Curtis	9 Cr. App. Rep. 9	102, 727
—— *v.* Customs and Excise Commissioners	[1913] 3 K. B. 483	340
—— *v.* Dodds	[1905] 2 K. B. 40	395
—— *v.* Edwards	8 Cr. App. Rep. 128	102
—— *v.* Elliott	1 Cr. App. Rep. 15	726
—— *v.* Freeman's Journal	[1902] 2 I. R. 82	866
—— *v.* Gover	1 Keb. 357	101
—— *v.* Harris	5 Cr. App. Rep. 285	102
—— *v.* Jones	2 Camp. 131	101
—— *v.* London Gas Light Company	8 B. & C. 54	603
—— *v.* Lovitt	[1912] A. C. 212	410
—— *v.* Monmouth Justices	4 B. & C. 844	395
—— *v.* ——————	30 Times L. R. 26	395
—— *v.* Norton	5 Cr. App. Rep. 197	572
—— *v.* Roberts	Carth. 226	102
—— *v.* Sheen	2 C. & P. 634	573
—— *v.* Southampton Licensing Justices	[1906] 1 K. B. 446	393, 708

		PAGE
Rex *v.* Special Commissioners of Income Tax	98 L. T. 446	635
—— *v.* Templer	[1912] 2 K. B. 444	262
—— *v.* Walsall Justices	[1910] 2 K. B. 210	713
Rhodes *v.* Soothill Wood Colliery Company	[1909] 1 K. B. 191	261
Rileys, In re	[1903] 2 Ch. 590	81
Robinson *v.* Fawcett	[1901] 2 K. B. 325	449
Rolfe *v.* Gregory	4 D. J. & S. 576	145
Roulstone *v.* Alliance Insurance Company	4 L. R. Ir. 547	844
Rouse *v.* Dixon	[1904] 2 K. B. 628	67
Russell *v.* Town and County Bank	13 App. Cas. 418	21, 898
Rutter *v.* Everett	[1895] 2 Ch. 872	910

S.

St. Nazaire Company, In re	12 Ch. D. 88	421
Samuel *v.* Newbolt	[1906] A. C. 461	376
——— *v.* Pazolt	23 Times L. R. 622	374
Saumarez, In re	[1907] 2 K. B. 170	78
Saunders *v.* Holborn Board of Works	[1895] 1 Q. B. 64	93
Savile *v.* Roberts	1 Ld. Raym. 374	6
Scarf *v.* Jardine	7 App. Cas. 345	67
Scott *v.* Avery	5 H. L. C. 811	247
—— *v.* Brown, Doering, McNab & Co.	[1892] 2 Q. B. 724	307
—— *v.* Morley	20 Q. B. D. 120	734
Scottish Provident Institution *v.* Allan	[1903] A. C. 129	651
Scottish Shire Line *v.* London and Provincial Marine and General Insurance Company	[1912] 3 K. B. 51	685
Sellman *v.* Boorn	8 M. & W. 552	581
Serle, In re	[1898] 1 Ch. 652	114
Sharp, In re	83 L. T. 416	697
Shaw *v.* Foster	L. R. 5 H. L. 321	330
Sheffield (Earl) *v.* London Joint Stock Bank	13 App. Cas. 333	172
Sheffield Nickel Company *v.* Unwin	2 Q. B. D. 214	144
Shephard, In re	43 Ch. D. 131	187
Shipwright *v.* Clements	63 L. T. 160	736
Shoreditch Corporation *v.* Bull	90 L. T. 210	93
Simkin *v.* London and North Western Railway Company	21 Q. B. D. 453	156
Simpson *v.* Scottish Union Insurance Company	1 H. & M. 618	550
Sinnott *v.* Bowden	[1912] 2 Ch. 414	548
Sion College *v.* London Corporation	[1900] 2 Q. B. 581; [1901] 1 K. B. 617	603, 608, 823
Sleap *v.* Newman	12 C. B. (N.S.) 116	564
Slobodinsky, In re	[1903] 2 K. B. 517	697
Smelting Company of Australia *v.* Inland Revenue Commissioners	[1897] 1 Q. B. 175	404
Smith *v.* Baker	[1891] A. C. 325	166, 353
—— *v.* Cannan	2 E. & B. 35	697
—— *v.* Cowell	6 Q. B. D. 75	186
—— *v.* Lion Brewery Company	[1909] 1 K. B. 711, 912; [1911] A. C. 150	891, 897

		PAGE
Smith *v.* London and St. Katharine Docks Company	L. R. 3 C. P. 326	320
——— *v.* Martin	2 Wms. Saund. 400	634
Smith's Advertising Agency *v.* Leeds Laboratory Company	26 Times L. R. 335	871
Smurthwaite *v.* Hannay	[1894] A. C. 494	750
Southhook Fire Clay Company *v.* Laughland	1908 S. C. 831	32
Southwell *v.* Savill Brothers	[1901] 2 K. B. 349	899
Spackman, In re	24 Q. B. D. 728	698
Spence *v.* Union Marine Insurance Company	L. R. 3 C. P. 427	489
Spencer *v.* Slater	4 Q. B. D. 13	698
Spillers & Bakers *v.* Taff Vale Railway Company	12 Ry. & Ca. Tr. Cas. 70	198
Stafford, Ex parte	Noted in Prideaux on Churchwardens, 16th ed. p. 111	670
Steele *v.* Midland Railway Company	L. R. 1 Ch. 275	635
Stella, The	[1900] P. 161	791
Stern *v.* Reg.	[1896] 1 Q. B. 211	173
Stevens *v.* Durban-Roodepoort Gold Mining Company	100 L. T. 481	24
Stevenson *v.* Glasgow Corporation	1908 S. C. 1034	155
Stewart *v.* Wilson	12 M. & W. 11	42
Stoddart *v.* Hawke	[1902] 1 K. B. 353	820
Streeter, Ex parte	19 Ch. D. 216	422
Studd *v.* Cook	8 App. Cas. 577	651
Surbiton Urban Council *v.* Callender's Cable and Construction Company	8 L. G. R. 244	887
Sutton *v.* Great Northern Railway Company	[1909] 2 K. B. 791	268
Swire, In re	30 Ch. D. 239	736

T.

Taff Vale Railway Company *v.* Amalgamated Society of Railway Servants	[1901] A. C. 426	933
Tanner *v.* European Bank	L. R. 1 Ex. 261	550
Tapster *v.* Ward	101 L. T. 503	689
Tasmania, The	15 App. Cas. 223	356
Tattersall *v.* National Steamship Company	12 Q. B. D. 297	795
Taubman *v.* Pacific Steam Navigation Company	1 Asp. M. L. C. 336	791
Taylor *v.* Caldwell	3 B. & S. 826	306
——— *v.* Smetten	11 Q. B. D. 207	871
Tench *v.* Roberts	6 Madd. 145, n.	414
Thames Conservators *v.* Gravesend Corporation	[1910] 1 K. B. 442	916
Thanemore (Steamship) *v.* Thompson	52 L. T. 552	751
Thomas *v.* Quartermaine	18 Q. B. D. 685	157
Thompson *v.* Brighton Corporation	[1894] 1 Q. B. 332	93
——— *v.* Gibson	10 L. J. (Ex.) 241	216
Tillett, In re	6 Morr. 70	912
Times Cold Storage Company *v.* Lowther	[1911] 2 K. B. 100	750
Toulmin *v.* Millar	58 L. T. 96	623

		PAGE
Tremeere *v.* Morrison	4 M. & Sc. 603	564
Turner *v.* Cuxon	22 Q. B. D. 150	651
——— *v.* Walsh	[1909] 2 K. B. 484	330
Tyler, In re	[1907] 1 K. B. 865	689

U.

Upper Forest and Western Steel and Tinplate Company *v.* Thomas	[1909] 2 K. B. 631	32
Urban *v.* Inland Revenue Commissioners	29 Times L. R. 141, 476	407

V.

Villars, Ex parte	L. R. 9 Ch. 432	698
Vint *v.* Hudspith	29 Ch. D. 322	422

W.

Wade *v.* Cockerline	10 Com. Cas. 47	791
Waddell *v.* Blockley	4 Q. B. D. 678	144
Walker *v.* Budden	5 Q. B. D. 267	422
——— *v.* Fraser's Trustees	1910 S. C. 222	623
Walsh *v.* Lonsdale	21 Ch. D. 9	331
Waltham Holy Cross Urban Council *v.* Lee Conservancy Board	103 L. T. 192	916
Ward *v.* Ayre	Cro Jac. 366	488
Watson *v.* All Saints, Poplar (Vestry)	46 L. T. 201	669
Waugh *v.* Morris	L. R. 8 Q. B. 202	308
Webb *v.* Beavan	11 Q. B. D. 609	7
Wemyss *v.* Hopkins	L. R. 10 Q. B. 378	571
Wernham *v.* Rex	[1914] 1 K. B. 468	342
West Cock, The	[1911] P. 23, 208	789
West Hartlepool Corporation *v.* Durham County Council	[1907] A. C. 246	855
Wheatley's Trustee *v.* H. Wheatley, Limited	85 L. T. 491	698
Whitaker *v.* Cohen	69 L. T. 451	185
White *v.* Cuyler	6 T. R. 176	783
——- *v.* Hindley Local Board	L. R. 10 Q. B. 219	90
Whitehaven Harbour Commissioners *v.* Whitehaven Union	94 L. T. 504	613
Whitehead *v.* Procter	3 H. & N. 532	597
Wilkinson *v.* Peel	[1895] 1 Q. B. 516	470
Williams *v.* Heales	L. R. 9 C. P. 177	562
———— *v.* Pritchard	4 T. R. 2	611
Willis *v.* Wells	[1892] 2 Q. B. 225	355
——- *v.* Young	[1907] 1 K. B. 448	871
Wilson *v.* Turner	22 Ch. D. 521	652
Wilton *v.* Leeds Forge Valley Company	32 W. R. 461	449
Wimbledon Park Golf Club *v.* Imperial Insurance Company	18 Times L. R. 815	551
Wood, In re	L. R. 7 Ch. 302	697
——- *v.* McCarthy	[1893] 1 Q. B. 775	933
Woodhouse *v.* Murray	L. R. 2 Q. B. 634	698
Woolf *v.* Claggett	3 Esp. 258	42
Wylie *v.* Eccott	6 Tax Cases, 128	898

Y.

		PAGE
Yorkshire West Riding Council *v.* Holmfirth Urban Sanitary Authority	[1894] 2 Q. B. 842 .	15, 916
Young *v.* Davis . . .	2 H. & C. 197 . . .	93
——— *v.* Kitchin . . .	3 Ex. D. 127 . . .	287
——— *v.* Rex	3 T. R. 98 . . .	730

CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

SHAFFER *v.* SHEFFIELD AND ANOTHER.

1914
Jan. 28.

Money-lender—Security taken by—Registered Name—Money-lenders Act, 1900 (63 *&* 64 *Vict. c.* 51), *s.* 2, *sub-s.* 1 (*c*).

The provision in s. 2, sub-s. 1 (*c*), of the Money-lenders Act, 1900, that a money-lender "shall not . . . . take any security for money in the course of his business as a money-lender otherwise than in his registered name" means that he shall not take it in a name other than his registered name; it does not prohibit him from taking a security on which his name does not appear at all, such as a bill of exchange indorsed to him in blank.

Trial of action before Channell J. without a jury.

The action was against the defendant T. W. Sheffield as the drawer and the defendant Florence Moore as the acceptor of a bill of exchange. The plaintiff was a money-lender carrying on business at Manchester, and in 1907 he was registered as carrying on business under the name of N. Stafford at 55, Cross Street, in that city. The defendant Sheffield, who resided in London, had on several occasions borrowed money from the plaintiff previously to 1907, and in December of that year he proposed to borrow from the plaintiff a sum of 150*l.* The plaintiff required as a condition of his making the loan that Sheffield should procure the acceptance by the defendant Miss Moore of a bill of exchange for 175*l.* It was arranged by Sheffield that the plaintiff should come up to London and meet himself and Miss Moore at the St. Pancras Hotel, where the bill of exchange should be handed over in return for the advance. The parties accordingly met at that hotel on December 28 and the arrangement was there carried out. The bill was drawn by Sheffield upon Miss Moore payable to his order. Miss Moore accepted it and Sheffield indorsed it in blank and handed it to the plaintiff. The plaintiff was a stranger to Miss Moore, who never had any interview or dealing with him except on that one occasion at the St. Pancras Hotel. Immediately afterwards both defendants went abroad, where they remained for some years. The bill not having been met at maturity, this action was brought in September, 1913, the delay in bringing it being due to the defendants' absence abroad.

F. B. Merriman, for the plaintiff.

A. E. Hughes, for the defendants. The bill of exchange is void, for the name of the plaintiff does not appear upon it, in contravention of s. 2, sub-s. 1, of the Money-lenders Act, 1900, which requires that "A money-lender as defined by this Act . . . . (*c*) shall not enter into any agreement in the course of his business as a money-lender with respect to the advance and repayment of money, or take any security for money in the course of his business as a money-lender, otherwise than in his registered name." The taking from the borrower of an open bill or cheque on which the lender's name does not appear is a taking of a security otherwise than in the lender's registered name. If the lender can take an open bill he can pass it to a holder in due course, who will be able to sue on it without being bound by the equities existing between the lender and the borrower. Such a transaction would come directly within the mischief that the Act was intended to meet, that of a money-lender transacting business without disclosing the nature of his calling. Further, the transaction offends against sub-s. 1 (*b*), which provides that a money-lender "shall carry on the money-lending business . . . . at his registered address or addresses and at no other address." The plaintiff's registered address was in Manchester, whereas the bill was signed and the money lent in London at the St. Pancras Hotel. In *Kirkwood* v. *Gadd* (1) Lord Loreburn said that if "a money-lending transaction, even a single transaction, goes through without the borrower being brought into communication with the registered address till after the transaction is completed, it might amount to carrying on business elsewhere than at his registered address." Here there is nothing to shew that Miss Moore had any knowledge that the plaintiff was a Manchester money-lender.

CHANNELL J. In this case the action is brought by a money-lender upon a bill of exchange, and the defence is that the plaintiff did not comply with the requirements of the Money-lenders Act, 1900. The facts are that the defendant Sheffield wanted to borrow some money, and accordingly, while he was residing in London, he opened a negotiation for a loan with the plaintiff, whose registered address was in Manchester. The plaintiff and his address were well known to him, and the negotiation began by Sheffield writing to the plaintiff at his registered address. The plaintiff agreed to make the required advance if Sheffield would procure the defendant Moore, who was a friend of his, to give her acceptance of a bill as security. At Sheffield's request he came up to London and the transaction was carried through at the St. Pancras Hotel, a bill of exchange being drawn by Sheffield to his order, accepted by Miss Moore, and indorsed to the plaintiff in blank. An action having been brought upon the bill, the defendants by way of defence take two objections under the Money-lenders Act. In the first place it is said that the bill is void because the plaintiff in taking it was carrying on his money-lending business at an address which was not his registered address. With that I cannot agree. The place where he carried on business was 55, Cross Street,

(1) [1910] A. C. 422.

Manchester. The correspondence in which the negotiation for the loan was conducted was addressed to him there. The mere fact that part of the business was done at the St. Pancras Hotel did not amount to a carrying on by him of his business there. For practical purposes no business can be wholly conducted at the registered address. The other point is a novel one. It is contended that the plaintiff's name ought to have appeared upon the bill as the indorsee. If the security had been a promissory note made jointly by the two defendants the name of the payee would have appeared upon the note. But here the security was a bill of exchange, in which the payee's name was not mentioned, for it was indorsed in blank. The question is whether the taking of such a security is a taking of it otherwise than in the money-lender's registered name. I think it is not. I think the meaning of the clause is that the money-lender is not to take the security "in a name other than his registered name." What is forbidden is doing business in another name. But where a security is taken in which the name of the payee is not given at all the case is not within the prohibition. If it were so a money-lender could not safely take a bond to bearer, and that is a thing which never could have been intended. There must be judgment for the plaintiff.

Judgment for plaintiff.

Solicitor for plaintiff: *William T. Hill, Manchester.*
Solicitors for defendants: *Oswald & Bird.*

J. F. C.

WIFFEN *v.* BAILEY AND ROMFORD URBAN DISTRICT COUNCIL.

1914
Jan. 16.

Malicious Prosecution—Damage necessary to support Action for—Summary Proceedings to compel Abatement of a Nuisance—Damage to Reputation—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 95.

A complaint under s. 95 of the Public Health Act, 1875, for non-compliance with a notice to abate a nuisance is a proceeding involving damage to the defendant's fair fame sufficient to support an action by him for malicious prosecution in the event of the complaint having been preferred maliciously and without reasonable and probable cause.

Rayson v. *South London Tramways Co.* [1893] 2 Q. B. 304, followed.

Further Consideration before Horridge J. after trial with a jury.

The plaintiff was the occupier of a house at Romford, certain of the rooms in which were in so dirty a condition that his wife wrote to the defendant Bailey, the sanitary inspector for the Romford urban district, asking him to view the premises, and inviting his assistance to compel the landlord to do the necessary cleansing and repairs. Bailey inspected the premises and as the result of his inspection served on the plaintiff a notice under s. 94 of the Public Health Act, 1875, stating that the want of cleansing of the rooms in question amounted to a nuisance and requiring him to abate the same. The plaintiff having failed to comply with the notice, the defendant Bailey, acting upon the instructions of the defendant council, preferred a complaint against him before the Romford justices under s. 95 (1) of the said Act for the purpose of enforcing the abatement of the nuisance. At the hearing the justices dismissed the complaint and awarded the plaintiff *5l.* *5s.* costs. The plaintiff had in defending himself against the prosecution incurred further costs as between solicitor and client amounting to *5l.* 15*s.* or 11*l.* in all. The plaintiff thereupon brought this action for malicious prosecution, alleging as the damage suffered by him that he had been injured in his reputation and had incurred expense in defending himself from the charge. At the trial the jury found that the defendants in taking the proceedings under s. 95 were actuated by malice, and the judge ruled that they had no reasonable and probable cause for so taking them. A verdict was given for 250*l.* damages.

---

(1) By s. 95 of the Public Health Act, 1875, "If the person on whom a notice to abate a nuisance has been served makes default in complying with any of the requisitions thereof within the time specified . . . . the local authority shall cause a complaint relating to such nuisance to be made before a justice, and such justice shall thereupon issue a summons requiring the person on whom the notice was served to appear before a Court of summary jurisdiction."

Sect. 96: "If the Court is satisfied that the alleged nuisance exists . . . . the Court shall make an order on such person requiring him to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance within a time specified in the order, and to do any works necessary for that purpose; . . . . The Court may by their order impose a penalty not exceeding five pounds on the person on whom the order is made."

H. Maddocks, for the defendants. The prosecution of the charge before the justices was not one in respect of which an action for malicious prosecution will lie. To support such an action the plaintiff must establish that he suffered one or other of the three kinds of special damage enumerated by Lord Holt in *Savile* v. *Roberts* (1)—(1.) damage to his fame, as if the matter whereof he is accused be scandalous; (2.) damage to his person, as by imprisonment; or (3.) damage to his property, as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused. The necessity of proving one or other of such heads of damage was admitted in *Quartz Hill Gold Mining Co.* v. *Eyre.* (2) The plaintiff here relies on the first and third of those heads, but in fact neither of of them was established. In the first place, proceedings under s. 95 for non-compliance with an abatement notice do not involve scandal to the plaintiff's fame. The charge must impute something discreditable. There is in this respect, as was pointed out by Bowen L.J. in *Quartz Hill Gold Mining Co.* v. *Eyre* (3), a certain degree of analogy between the action of malicious prosecution and that of slander; and in the case of slander it is not every imputation of a criminal offence that is actionable without proof of special damage, but only of such a criminal

(1) (1699) 1 Ld. Raym. 374.

(2) (1883) 11 Q. B. D. 674.

(3) 11 Q. B. D. at p. 692.

offence as is directly punishable with imprisonment. "Words imputing that the plaintiff has rendered himself liable to the mere infliction of a fine are not slanderous, but . . . . it is slanderous to say that he has done something for which he can be made to suffer corporally": per Pollock B., *Webb* v. *Beavan.* (1) That proposition was adopted with approval in *Hellwig* v. *Mitchell* (2) and *Michael* v. *Spiers & Pond.* (3) It is true that under the Summary Jurisdiction Acts a person neglecting to pay a fine may be ordered to be imprisoned without any proof of means, but such imprisonment is imposed for non-payment of the fine and not as punishment for the original offence. Therefore the offence charged in the present case, inasmuch as it was punishable by fine only and not by imprisonment, would not have involved sufficient scandal to support an action for slander, and if so, then neither can it suffice to support an action for malicious prosecution. The case of *Rayson* v. *South London Tramways Co.* (4), however, will be relied on by the plaintiff. There the plaintiff had been summoned under the Tramways Act, 1870, for having wilfully travelled upon a tramway for a greater distance than she was entitled by the fare which she had paid, for which offence the Act imposed a penalty recoverable summarily. The summons having been dismissed, it was held that an action for malicious prosecution would lie. But there the charge obviously involved scandal to the plaintiff's fame, the offence imputed to her having been the discreditable one of attempting to cheat the tramway company. It is true that Lord Esher there used language suggesting that any criminal charge, whatever the nature of the punishment that it involved, would suffice to found an action for malicious prosecution, but for the reason above given that suggestion was only obiter; while it is not to be presumed that he intended to overrule Lord Holt's proposition that the charge must be such that "the matter whereof" the plaintiff "is accused be scandalous." Secondly, the plaintiff cannot rely for his damage on any expense that he has been put to in defending himself. He was awarded 5*l.* 5*s.* costs by the order of the justices who heard the complaint, and

(1) (1883) 11 Q. B. D. 609.

(2) [1910] 1 K. B. 609.

(3) (1909) 25 Times L. R. 740.

(4) [1893] 2 Q. B. 304.

it must be assumed that that sum was intended to be in satisfaction of all the costs to which he was legally entitled. The difference between solicitor and client costs and party and party costs is not legal damage. [He referred to *Barnett* v. *Eccles Corporation.* (1)]

G. W. R. Jones and *A. Crew*, for the plaintiff. None of the cases relied upon by the defendants are cases of malicious prosecution, they are cases of slander only; and slander and malicious prosecution do not in this respect stand upon the same footing. Such analogy as there is between the two was conceded by Bowen L.J. in the *Quartz Hill Case* (2) to be by no means perfect. In *Hellwig* v. *Mitchell* (3) Bray J. in holding that words imputing an offence punishable by fine only would not support an action of slander was influenced by the fact that actions for slander were already much too common and that it was inadvisable to extend that form of action. The present case is in fact covered by *Rayson* v. *South London Tramways Co.* (4) There Lord Esher held that the action for malicious prosecution would lie for proceedings maliciously taken under the Tramways Act, 1870, not because the charge imputed a fraud, but because it alleged a breach of a statute. If a statute "prohibits a matter of public grievance to the liberties and securities of the subject, or commands a matter of public convenience (such as the repairing of highways or the like) all acts or omissions contrary to the prohibition or command of the statute are misdemeanors at common law, punishable by indictment, unless such method of procedure manifestly appears to be excluded by the statute": Archbold's Criminal Pleading, 24th ed., p. 3. In *Reg.* v. *Whitchurch* (5), a case which dealt with the very sections now under discussion. Bramwell L.J. said: "When a notice to abate has been served under the Public Health Act, 1875, s. 94, the effect is the same as if the abatement had been directed by statute." Therefore the neglect to comply with an abatement notice would, but for the fact that the Act provides a summary procedure, be an indictable misdemeanour and punishable with imprisonment

---

(1) [1900] 2 Q. B. 423.

(2) 11 Q. B. D. 674.

(3) [1910] 1 K. B. 609.

(4) [1893] 2 Q. B. 304.

(5) (1881) 7 Q. B. D. 534.

Then *Rayson's Case* (1) went one step further and established that the fact of the statute excluding the remedy by indictment and substituting summary proceedings did not affect the degree of criminality of the act, or prevent those proceedings from being sufficiently scandalous to support an action for malicious prosecution.

Maddocks in reply. The only question in *Reg. v. Whitchurch* (2) was whether the neglect to abate the nuisance was a "criminal cause or matter" within s. 47 of the Judicature Act, 1873, so as to render an order made in the matter unappealable. It is one thing to say that a matter is criminal for that purpose, and quite another to say that proceedings in respect of it involve scandal to the fair fame of the party proceeded against.

HORRIDGE J. This case seems to me to raise a very difficult question. It is said that the proceedings complained of were not proceedings in respect of which an action for malicious prosecution will lie. The question as to the class of proceedings in respect of which a plaintiff is entitled to recover in that form of action was discussed in *Quartz Hill Gold Mining Co.* v. *Eyre.* (3) There the Court of Appeal adopted with approval Lord Holt's ruling in *Savile* v. *Roberts* (4) that the action will not lie in the absence of proof that the plaintiff suffered one of the three sorts of damage which he there enumerated: 1. "The damage to a man's fame, as if the matter whereof he is accused be scandalous." That is one of the two heads of damage which is relied on by the plaintiff in the present case. 2. "The second sort of damages which would support such an action are such as are done to the person; as where a man is put in danger to lose his life, or limb or liberty, which has been always allowed a good foundation of such an action." That question does not arise here, for the plaintiff was never put in prison nor was his liberty in any way affected. 3. "The third sort of damages which will support such an action is damage to a man's property, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused. . . . .

---

(1) [1893] 2 Q. B. 304.
(2) 7 Q. B. D. 534.
(3) 11 Q. B. D. 674.
(4) 1 Ld. Raym. 374.

That a man in such case is put to expenses is without doubt, which is an injury to his property; and if that injury is done to him maliciously it is reasonable that he should have an action to repair himself." That is the second head of damage upon which the plaintiff here relies. The first question therefore seems to be whether the proceedings complained of were of such a character as to involve scandal to the plaintiff's reputation. When dealing with that subject in the case of *Quartz Hill Gold Mining Co.* v. *Eyre* (1) Bowen L.J. suggested that there was an analogy in this respect between the action for malicious prosecution and the action for slander, though he was careful to add that the analogy was not perfect. Let us then consider what are the kinds of criminal offences the imputation of which would give rise to an action of slander. In *Webb* v. *Beavan* (2) Pollock B. said that they were not limited to indictable offences, though the expression "indictable offences" had crept into the text books, but extended to criminal offences of all kinds provided they were punishable with imprisonment. "The distinction" he said "seems a natural one, that words imputing that the plaintiff has rendered himself liable to the mere infliction of a fine are not slanderous, but that it is slanderous to say that he has done something for which he can be made to suffer corporally." The question arose later on in two cases, one before Lawrence J., *Michael* v. *Spiers & Pond* (3), and the other before Bray J., *Hellwig* v. *Mitchell* (4), and I think the substance of both those cases may be summed up in the words of Bray J. (5) "In the absence of special damage slander is only actionable in certain cases, one of which is where the words impute the commission of a criminal offence punishable by imprisonment." For the purposes then of an action for slander the offence imputed must be one which is punishable with imprisonment. That being the rule with regard to the action of slander, what is the rule with regard to an action for malicious prosecution? In my opinion if the offence charged is one which would be punishable by fine and imprisonment apart from the special remedy by summary proceedings provided by the statute creating the offence, such offence is one of a criminal nature in respect of which an action for malicious prosecution will lie. This appears I think from the two cases of *Rayson* v. *South London Tramways Co.* (1) and *Reg.* v. *Whitchurch.* (2) In *Rayson* v. *South London Tramways Co.* (1) the plaintiff was summoned for having in contravention of the Tramways Act, 1870, travelled on a tramway for a greater distance than she was entitled to travel for the fare which she had paid, and for refusing to pay the additional fare. Such refusal to pay was made by the Act an "offence," and was punishable summarily by fine. The Court held that the proceedings before the magistrate to recover the fine were proceedings in respect of which the action lay. Lord Esher M.R. said: "The offence amounts to a misdemeanour, and if the peculiar mode of dealing with it had not been enacted by the same statute which creates the offence, it would be punishable, upon an indictment, as a misdemeanour, and subject the offender to fine or imprisonment; but the Legislature having put into the statute what the punishment shall be for the new offence created—that is the only punishment which can be inflicted. The statutory punishment is part of the punishment of a common law misdemeanour, although the process provided by the statute is not the same as in the case of a common law misdemeanour. It is perfectly clear to my mind that this is a criminal offence, and therefore that an action for malicious prosecution will lie." In the case of *Reg.* v. *Whitchurch* (2), where the Court of Appeal were dealing with these very sections, they held that proceedings for non-compliance with an abatement notice were a "criminal cause or matter" within s. 47 of the Judicature Act. Bramwell L.J. said: "If no mode of enforcing it"—the notice—"were pointed out by the statute disobedience to it would be a misdemeanour at common law punishable by fine and imprisonment; in this event the disobedience would be undoubtedly criminal. The procedure, however, is somewhat altered, and instead of being fined and imprisoned at the discretion of the Court, the offender is liable to be fined to a limited amount, and not to be imprisoned if he

---

(1) 11 Q. B. D. 674.

(2) 11 Q. B. D. 609.

(3) 25 Times L. R. 740.

(4) [1910] 1 K. B. 609.

(5) Ibid. at p. 612.

---

(1) [1893] 2 Q. B. 304.

(2) 7 Q. B. D. 534.

1914

WIFFEN
v.
BAILEY AND
ROMFORD
URBAN
COUNCIL.

Horridge J.

pays the fine." He then proceeds to express the opinion that the changes of procedure and punishment made no difference to the criminality of the disobedience. This ruling of Bramwell L.J. expressly lays down that an offence under the sections under discussion would be punishable by fine and imprisonment except for the special procedure provided by the Act and brings this offence within the ruling in *Rayson* v. *South London Tramways Co.* (1), and therefore binds me to hold that the proceedings before the justices in this case involved scandal to the plaintiff's fair fame, and thereby caused him sufficient damage to enable him to maintain this action. With regard to the other question, namely, whether the *5l.* 15*s.* costs as between solicitor and client incurred by the plaintiff over and above the *5l.* 5*s.* awarded by the justices is sufficient damage to the plaintiff's property to support the action, I think the case of *Barnett* v. *Eccles Corporation* (2) is a clear authority that it is not. There must be judgment for 250*l.* damages against both defendants.

Judgment for plaintiff.

Solicitors for plaintiff: *Lloyd Richardson & Co.*
Solicitors for defendants: *Hunt & Hunt.*

(1) [1893] 2 Q. B. 304.

(2) [1900] 2 Q. B. 423.

J. F. C.

WEST RIDING OF YORKSHIRE RIVERS BOARD v. LINTHWAITE URBAN DISTRICT COUNCIL.

1914
Jan. 30.

Local Government—Public Health—River—Pollution—Polluting Liquid—Sewer vested in Local Sanitary Authority—Proceedings against Sanitary Authority—Rivers Pollution Prevention Act, 1876 (39 *&* 40 *Vict. c.* 75), *ss.* 4, 6.

Proceedings cannot be taken against a local sanitary authority, under s. 4 of the Rivers Pollution Prevention Act, 1876, for causing or permitting polluting liquid proceeding from a factory or manufacturing process to fall or flow or be carried into a stream.

Appeal from the Huddersfield County Court.

The plaintiffs brought these proceedings in the county court against the defendants under s. 4 of the Rivers Pollution Prevention Act, 1876 (1), complaining that the defendants caused and

---

(1) 39 & 40 Vict. c. 75, s. 4: "Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any poisonous, noxious, or polluting liquid proceeding from any factory or manufacturing process shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act. . . ."

Sect. 6: "Unless and until Parliament otherwise provides the following enactments shall take effect, proceedings shall not be taken against any person under this Part of this Act save by a sanitary authority, nor shall any such proceedings be taken without the consent of the Local Government Board: Provided always, that if the sanitary authority, on the application of any person interested alleging an offence to have been committed, shall refuse to take proceedings or apply for the consent by this section provided, the person so interested may apply to the Local Government Board, and if that Board on inquiry is of opinion that the sanitary authority should take proceedings, they may direct the sanitary authority accordingly, who shall thereupon commence proceedings.

"The said Board in giving or withholding their consent shall have regard to the industrial interests involved in the case and to the circumstances and requirements of the locality.

"The said Board shall not give their consent to proceedings by the sanitary authority of any district which is the seat of any manufacturing industry, unless they are satisfied, after due inquiry, that means for rendering harmless the poisonous, noxious, or polluting liquids proceeding from the processes of such manufactures are reasonably practicable and available under all the circumstances of the case, and that no material injury will be inflicted by such proceedings on the interests of such industry.

"Any person within such district as aforesaid, against whom continued to cause to fall or flow and knowingly permitted and still permitted to fall or flow or to be carried into the river Colne, within the jurisdiction of the plaintiffs, polluting liquid proceeding from certain specified factories situate within the district of the defendants and from the manufacturing processes carried on in those factories; and the plaintiffs claimed a summary order requiring the defendants to abstain from the commission of those offences.

The plaintiffs, under a provisional order confirmed by statute (56 & 57 Vict. c. cxxxii., clause 12), had all the powers and duties of a sanitary authority under the Rivers Pollution Prevention Act, 1876. The defendants were the urban sanitary authority of the district in which the alleged pollution of the river was caused. The plaintiffs alleged that the polluting liquid was carried into the river through a sewer vested in the defendants under s. 13 of the Public Health Act, 1875.

The county court judge made an order against the defendants, who appealed.

Waugh, K.C., and *R. A. Shepherd*, for the appellants. Under s. 4 of the Rivers Pollution Prevention Act, 1876, proceedings cannot be taken against a sanitary authority. Under s. 3 proceedings can be taken against a sanitary authority; but there is an essential difference between s. 3 and s. 4. Sect. 3 is in Part II. of the Act, whereas s. 4 is in Part III. The former deals with

---

proceedings are proposed to be taken under this Part of this Act, shall, notwithstanding any consent of the Local Government Board, be at liberty to object before the sanitary authority to such proceedings being taken, and such authority shall, if required in writing by such person, afford him an opportunity of being heard against such proceedings being taken, so far as the same relate to his works or manufacturing processes. The sanitary authority shall thereupon allow such person to be heard by himself, agents, and witnesses, and after inquiry such authority shall determine, having regard to all the considerations to which the Local Government Board are by this section directed to have regard, whether such proceedings as aforesaid shall or shall not be taken; and where any such sanitary authority has taken proceedings under this Act, it shall not be competent to other sanitary authorities to take proceedings under this Act till the party against whom such proceedings are intended shall have failed in reasonable time to carry out the order of any competent Court under this Act."

"sewage pollutions," and the latter with "manufacturing and mining pollutions." The whole of Part III. clearly contemplates proceedings against mine owners or manufacturers only; and the provisions of s. 6, which relate only to proceedings under Part III., shew that such proceedings cannot be taken against a sanitary authority. Proceedings are to be taken by a sanitary authority only, and not without the consent of the Local Government Board. The provisions of s. 6 are wholly inconsistent with any proceedings being taken against a sanitary authority. [They referred to *Butterworth* v. *West Riding of Yorkshire Rivers Board* (1), *Kirkheaton Local Board* v. *Ainley* (2), and *Yorkshire West Riding Council* v. *Holmfirth Urban Sanitary Authority*. (3)]

M. Shearman, K.C., and *Lowenthal*, for the respondents. It is admitted that proceedings can be taken against a sanitary authority under s. 3, and s. 4 uses precisely the same language as s. 3 in defining the offence. Therefore, if a sanitary authority can commit the offence defined in s. 3, it can equally commit the offence defined in s. 4. The wide general words of s. 4 will clearly include a sanitary authority, and the effect of the operative words of s. 4 ought not to be cut down by reason of the special provisions of s. 6 relating to proposed proceedings by the sanitary authority against manufacturers. This Act was passed before the powers of a sanitary authority were conferred upon the rivers board in 1893, and the provisions of s. 6 are directed to the state of the law at that time, when proceedings could be taken by the local sanitary authority alone.

Waugh, K.C., was not called upon to reply.

Ridley J. Upon the one point which has been argued out before us, we have come to the conclusion that the judgment of the county court judge must be set aside upon the ground that the urban district council cannot properly be made defendants to proceedings under s. 4 of the Rivers Pollution Prevention Act, 1876.

It has been argued for the plaintiffs that the words at the commencement of s. 4 are sufficiently wide to include these defendants as a "person" within that section. That is true, but there are other provisions which seem to us to exclude them from the operation of s. 4. With regard to s. 3, I wish to say at once that it appears to me to be entirely different in its terms and in its purpose. It was decided in *Butterworth* v. *West Riding of Yorkshire Rivers Board* (1) that a manufacturer commits an offence under s. 4 if he discharges polluting liquid into a sewer from which it finds its way into a stream, even if there is a prescriptive right to discharge into the sewer. It has also been decided in more than one case that a local sanitary authority can be proceeded against under s. 3: *Kirkheaton Local Board* v. *Ainley* (2); *Yorkshire West Riding Council* v. *Holmfirth Urban Sanitary Authority* (3); and by the amending Act of 1893 (4) the Legislature has given effect to the previous decisions of the Courts by enacting that, for the purposes of s. 3 of the Act of 1876, a sanitary authority shall be deemed to knowingly permit sewage matter to be carried into a stream if the sewage matter passes through a channel vested in them. All that is quite clear, but when we come to s. 4 it appears to me that the difference is very plain.

---

(1) [1909] A. C. 45.

(2) [1892] 2 Q. B. 274.

(3) [1894] 2 Q. B. 842.

There can be no question that the plaintiffs are constituted a sanitary authority, for the purposes of the Rivers Pollution Prevention Acts, by the Provisional Orders Confirmation Act, 1893. (5) They do not supersede the existing local sanitary authorities, but they may override them. That, however, does not affect the question which we have now to decide, which arises under s. 4. That section is confined to persons who cause or permit any poisonous, noxious, or polluting liquid from a factory to flow into a stream. I agree that those words by themselves would apply to a corporation even without the definition clause (s. 20); and I do not deny that, standing by themselves, they would include a sanitary authority having the power and the duty to enforce the Act just as much as the provisions of s. 3. We cannot, however, consider s. 4 apart from ss. 5 and 6. Part II.

---

(1) [1909] A. C. 45.
(2) [1892] 2 Q. B. 274.
(3) [1894] 2 Q. B. 842.
(4) 56 & 57 Vict. c. 31.
(5) 56 & 57 Vict. c. cxxxii., s. 12.

of the Act ends with s. 3, and then comes Part III., which comprises ss. 4, 5, and 6.

The provisions of s. 6 seem to me to assume that the person to be proceeded against under Part III. must be some person other than the sanitary authority which is to take the proceedings. They provide that "proceedings shall not be taken against any person under this Part of this Act save by a sanitary authority." Such proceedings may, of course, now be taken by either the district sanitary authority or the rivers board which has been given the powers of a sanitary authority. Sect. 6 then goes on to say that, if the sanitary authority refuse to take proceedings, any person interested may complain to the Local Government Board, who may compel the sanitary authority to proceed. Now, can a sanitary authority take proceedings against themselves? There are now two independent sanitary authorities, the one perhaps overriding the other; but when s. 6 was enacted the state of things was otherwise; and we have to consider the position when there was only one sanitary authority on the one side, who might take proceedings, and on the other side a person against whom proceedings might be taken. I cannot think that, having regard to that position, we ought now to say that a subsequently constituted sanitary authority can put the original sanitary authority under the Act in the position of a person who was by s. 6 certainly put in opposition to them. Then s. 6 contains a further provision that the Local Government Board shall not consent to proceedings by the sanitary authority without inquiry and due consideration of the manufacturing interests of the locality. There, again, it must necessarily be understood that the inquiry and consideration are intended to protect those against whom the sanitary authority can take proceedings. The last paragraph of s. 6 admittedly can refer only to a person other than the sanitary authority.

The result is that I have come to the conclusion that it is not possible to read ss. 4, 5, and 6 as enabling proceedings to be taken under s. 4 against a sanitary authority, who are one of the authorities entrusted with the carrying out of this part of the Act. For these reasons I am of opinion that the appeal must be allowed and the judgment of the county court judge reversed.

Bankes J. I agree. The point is an important one and, therefore, perhaps I ought to add my reasons to what Ridley J. has said, though I agree in substance with all that has fallen from him. There is a wide distinction between ss. 3 and 4 of the Act of 1876. The distinctions have been dealt with during the argument, and I need not allude to them in detail. Nobody contends that proceedings for an offence under s. 3 could not be taken against the local sanitary authority; but the point here is that proceedings under s. 4 cannot be taken against such an authority because, it is said, when the language of Part III. of the statute is carefully considered, it is clear that the language excludes the possibility of a local sanitary authority being an offender against that part of the Act. That is the only question with which we are now dealing.

Part III. of the Act includes ss. 4, 5, and 6, and deals with manufacturing and mining pollutions. I need not refer to mining pollution, although I think the words of s. 5, dealing with mining pollution, point strongly in the same direction as the words of this part of the Act dealing with manufacturing pollution. If one looks at s. 4, the offence there dealt with is causing to fall or flow or knowingly permitting to fall or flow or to be carried into any stream any poisonous, noxious, or polluting liquid proceeding from any factory or manufacturing process. Prima facie the person one would suppose to be responsible for such an offence is the person who either owns or carries on the factory or manufacturing process; but one realizes that there may be other people who may be said to cause or knowingly permit the fall or flow of some of these liquids because, in the course of passing from the place where the liquid is manufactured to the stream into which it ultimately discharges, the liquid may be under the control of, or may be directed by, some person other than the owner of the factory or the manufacturing process.

It is quite true that the words used in s. 4 are identical with the words used in s. 3. Each deals with the offence in this way. It speaks of "Every person who causes to fall or flow." If there was nothing in Part. III. to limit the offence, it is plain that there is no reason why the language of s. 4 should be restricted any more than the language of s. 3. When, however, we look at

s. 6, it commences by imposing a restriction; it says that "proceedings shall not be taken against any person under this Part of this Act save by a sanitary authority." Then it goes on to state the circumstances under which they are to be taken. Therefore it is plain that we must read ss. 4 and 6 together, as s. 6 imposes a restriction upon the proceedings which can be taken under s. 4. When we look more closely into s. 6, it is clear that there are two classes of persons or bodies there dealt with. One is the body or person by whom the proceedings are to be taken; and the other is the body or person against whom the proceedings may be taken. It is plain that the person or body who is to take proceedings cannot be the same person or body against whom the proceedings are to be taken; but I do not think that that is conclusive of the point now under discussion, because it is conceivable that one sanitary authority may be causing or permitting polluting liquid to flow into a river within the district of another sanitary authority. Therefore I do not think that that argument is conclusive to shew that a sanitary authority could not be prosecuted by reason of that language taken alone; but when one goes further into the section to ascertain who the person or body is against whom the proceedings may be taken, I think the language is clear to shew that it is the person whose factory or manufacturing process is producing the liquid which is complained of. I think that is to be found in the third and fourth paragraphs of s. 6. Dealing first of all with the third paragraph, it says: "The said Board shall not give their consent to proceedings by the sanitary authority of any district which is the seat of any manufacturing industry, unless they are satisfied, after due inquiry, that means for rendering harmless the poisonous, noxious, or polluting liquids proceeding from the processes of such manufactures are reasonably practicable and available under all the circumstances of the case." I think that means rendering harmless by the person who is producing the liquid, and that it does not point to rendering harmless by the sanitary authority by treatment under some general sewage system. Again, the last paragraph of s. 6 says: "Any person within such district as aforesaid against whom proceedings are proposed to be taken under this Part of this Act shall, notwithstanding any

1914

WEST RIDING OF YORKSHIRE RIVERS BOARD v. LINTHWAITE URBAN COUNCIL.

Bankes J.

consent of the Local Government Board, be at liberty to object before the sanitary authority to such proceedings being taken; and such authority shall, if required in writing by such person, afford him an opportunity of being heard against such proceedings being taken, so far as the same relate to his works or manufacturing processes." I read that paragraph, when it says "any person," as meaning "every person," that is, every person whose works or manufacturing processes are said to send forth the noxious or polluting liquid. In the view which I take of the language of s. 6, it is to my mind plain that the persons against whom the proceedings are to be taken are limited to persons who are sending forth, or creating at their works or by their manufacturing processes, some of those liquids which are dealt within s. 4. Now, assuming that view to be right, at the time this Act was passed it was not possible for proceedings to be taken against a sanitary authority. All that has happened since then is that, by the provisional order to which we have been referred, a joint committee has been created in the county of York, and by clause 12 the committee are given all the powers and duties of a sanitary authority under the Act of 1876. The view I take of that clause is that it simply creates an additional sanitary authority, by whom proceedings can be taken under s. 6. If that is the correct view, it follows that the creation of this body as an additional prosecuting body does not alter the effect of s. 6, or increase the number or the character of the persons against whom the proceedings can be taken. That being so, these proceedings were misconceived, and the learned county court judge was wrong in the conclusion at which he arrived.

Appeal allowed.

Solicitor for appellants: *Edgar Bogue, for Owen & Bailey, Huddersfield.*

Solicitors for respondents: *Clements, Williams & Co., for H. F. Atter, Wakefield.*

J. H. W.

GENERAL HYDRAULIC POWER COMPANY, LIMITED v. HANCOCK.

1913
Dec. 16.

Revenue—Income Tax—Profits of Trade—"Fair and just average"—Deductions—Land owned by Trader—Exclusive User for Purposes of Trade—Annual Value—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, Case I., r.* 1, *Cases I. and II., r.* 1—*Finance Act*, 1898 (61 & 62 *Vict. c.* 10), *s.* 9.

A company carrying on a business owned certain lands which were used exclusively for the purposes of the business. In an assessment made on the company under Sched. D of the Income Tax Acts for the year ending April 5, 1912, the annual value of the lands as represented by the Sched. A assessment in each of the three previous years was deducted from the profits of each of the said years before striking the average. The amount assessed under Sched. A for the year of assessment was larger than in the previous years, and the company claimed that the average profits for the three previous years should be ascertained without the deduction of the amount of the Sched. A assessment in each of the years, and that from the amount of the average profits thus ascertained the amount of the Sched. A assessment for the year of assessment should be deducted:—

Held, that the contention of the company was erroneous and that the assessment had been made upon the right principle.

Russell v. *Town and County Bank* (1888) 13 App. Cas. 418 followed and applied.

Case stated under 43 & 44 Vict. c. 19, s. 59, by the Commissioners for the General Purposes of the Income Tax Acts for the Division of St. Margaret and St. John in the county of Middlesex.

At a meeting of the said Commissioners the appellants, the General Hydraulic Power Company, appealed against an assessment of 45,596*l.* (less an allowance for depreciation amounting to 14,710*l.*) made on the company under Sched. D of the Income Tax Acts for the year ending April 5, 1912, in respect of the profits from their business as suppliers of hydraulic power. The appellants claimed that, in the computation of the profits on the average of the three years preceding the year of assessment, the deduction to be made in respect of the properties owned and occupied by the company and assessed under Sched. A should be the amount so assessed in the year of assessment ending April 5, 1912, and that the sums assessed under Sched. A in each of the three previous years should not be deducted from the profits thereof before striking the average.

The following facts were found or admitted. The appellant company was incorporated in England under the Companies Acts. The objects of the company were (amongst other things) to supply hydraulic power for public or private works, establishments, or buildings, and to acquire any real or personal property which might be required for the purposes of the company.

For the purposes of their business the company had purchased and were the owners and occupiers of various freehold and leasehold properties. The company had been assessed to income tax under Sched. A as occupiers of these properties so far as they were liable to be assessed, and under Sched. D in respect of the profits and gains of the company's business.

The company's freehold and leasehold properties chargeable under Sched. A were assessed in the aggregate (as reduced by one-sixth under s. 35 of the Finance Act, 1894) in the year 1908-9 in the sum of 21,449*l.* 10*s.* and in each of the years 1909-10 and 1910-11 in the sum of 21,616*l.* 4*s.* Income tax on such assessments had been duly paid by the company.

In the year 1911-12, as a result of the last quinquennial valuation and of the acquisition of a further property by the company in that year, the assessment of the company's properties was increased, and in that year the aggregate of the assessments upon the whole of the properties owned and occupied by the company was 24,095*l.* 17*s.*, being an increase of 2479*l.* 13*s.* over the aggregate assessments of the preceding year, and the income tax on the said assessments had been duly paid by the company.

The assessment under Sched. D for the year 1911-12, which was not in dispute, except as to the amount to be deducted in respect of the assessments under Sched. A was computed as follows:—

1913

GENERAL HYDRAULIC POWER COMPANY, LIMITED v. HANCOCK.

	1908.	1909.	1910.
Aggregate profits	£65,370	£66,327	£69,773
Deduct amount assessed under Sched. A in each of these years	21,449	21,616	21,616
	£43,921	£44,711	£48,157

Net profits for Sched. D assessment.	1908	£43,921
	1909	£44,711
	1910	£48,157
		3)£136,789

Assessable liability for Sched. D for 1911-12 ... £45,596 (less depreciation £14,710=£30,886)

The company contended:

(1.) That the assessment should be computed as follows:—

Aggregate profits	1908	£65,370
,, ,, ...	1909	£66,327
,, ,, ...	1910	£69,773
Divide by 3 to obtain the average of the balance of profits and gains ...		3)201,470
		£67,156
Deduct amount assessed under Sched. A in the year of assessment, i.e., the year ending April 5, 1912, upon which the income tax had already been paid ...		£24,096
		£43,060

leaving a sum of 43,060*l.* less 14,710*l.* for depreciation, making a total of 28,350*l.* upon which the company was liable to be assessed for income tax.

(2.) That the said sum of 24,096*l.* (being the amount assessed upon the company's before-mentioned leasehold and freehold properties for the year ending April 5, 1912, and on which the company had already paid income tax) should be deducted from the sum of 52,446*l.* (being 67,156*l.* the average of the balance of profits and gains of the company for the three preceding years less 14,710*l.* deducted for depreciation), leaving a sum of 28,350*l.* on which the company was liable to be assessed for income tax.

(3.) That by any other mode of assessment (as the company had already paid income tax on the sum of 24,096*l.* under Sched. A) the company would be paying the same tax twice over in the same year.

It was contended by the surveyor of taxes on behalf of the Crown: That the assessments under Sched. A were made in respect of the annual value of the premises used for the purpose of the trade, and that the deduction thereof in estimating the amount of the annual profits of the trade was equivalent to the deduction of rent and must be deducted from the profits of each year before striking the statutory average; and he referred to rr. 1 and 2 of Rules applying to the first and second Cases of Sched. D, ss. 100 and 159, of the Income Tax Act, 1842; s. 9 of the Finance Act, 1898; *Stevens* v. *Durban-Roodepoort Gold Mining Co.* (1)

The Commissioners were of opinion that the company was not entitled to have the amount of the Sched. A assessments of the year of assessment deducted in arriving at the average profits of the three preceding years, but that the sums assessed in each of the three years, on the average of which the profits fell to be computed, should be deducted from each of the said years before striking the average. The Commissioners accordingly dismissed the appeal.

Macmorran, K.C., and *P. J. G. Henriques*, for the appellants. In computing the average profits for the three years preceding the year of assessment the deduction in respect of the annual value of the lands owned by the appellants and used by them for the purpose of their business ought not to be deducted from the profits and gains in each of the three years; the amount to be deducted, which by s. 9 of the Finance Act, 1898, is not to exceed the Sched. A assessment, is the annual value for the year in respect of which the Sched. D assessment is made, and that amount must be deducted from the previously ascertained average profits in order to arrive at the Sched. D assessment for the year in question. By the first rule under the first Case in Sched. D the duty is to be charged "on the full amount of the balance of the profits or gains" of the trade, and the first rule applicable to both the first and second Cases shews that in estimating the balance of the profits or gains for any one year any disbursements or expenses which are wholly and exclusively incurred for the purposes of the trade may be deducted. The rent paid for premises used for the business must obviously be deducted before the profits for the year can be ascertained, but the annual value of lands owned by the trader cannot be regarded as being on the same footing as rent; it is not a disbursement or expense which can be allocated to each year. It would not be included in the trader's annual balance-sheet, and it is really the profits as shewn by the balance-sheet which are to be taken as the profits for any one year. If the contention of the Crown is correct and it is not permissible to deduct the whole of the Sched. A assessment for the year in respect of which the Sched. D assessment is made, the result is that the tax is payable twice over on part of the Sched. A assessment, which is contrary to the express provision of s. 60 of the Taxes Management Act, 1880. [*Stevens* v. *Durban-Roodepoort Gold Mining Co.* (1) was cited.]

---

(1) (1909) 100 L. T. 481.

W. Finlay (*Sir J. A. Simon, A.-G.*, with him), for the respondent. For the purpose of the Sched. D assessment it is necessary to ascertain the balance of the profits or gains "upon a fair and just average of three years": Sched. D, first Case, first rule. In order to get the average of three years, you must first get the profits for each of the three years. It is conceded by the appellants that in order to arrive at the profits for any one year the rent paid for the business premises in that year must be deducted. If a trader owns his business premises instead of renting them he must equally deduct the annual value of the premises before he can arrive at the amount of his profits for the year. It is "money wholly and exclusively laid out or expended for the purposes of" the trade, within the first rule applicable to the first and second Cases. The point is really concluded by *Russell* v. *Town and County Bank* (2), where Lord Herschell

(1) 100 L. T. 481.

(2) 13 App. Cas. 418, at p. 425.

1913

GENERAL HYDRAULIC POWER COMPANY, LIMITED *v.* HANCOCK.

said: "It is not disputed that the annual value of premises exclusively used for business purposes is properly to be deducted in arriving at the balance of profits and gains . . . . But there may be a question where the right to make the deduction is to be found. I am myself disposed to think that it is allowed because it is an essential element to be taken into account in ascertaining the amount of the balance of profits." Lords Fitzgerald and Macnaghten used language to the same effect. Further, s. 9 of the Finance Act, 1898, clearly contemplates that there may be a deduction of the annual value of the business premises from the amount of the "annual profits" accruing from the trade. The decision of the Commissioners was therefore right.

Macmorran, K.C., replied.

Scrutton J. This is a special case stated by the Commissioners for General Purposes of the Income Tax for the Division of St. Margaret and St. John in the county of Middlesex. The appellants, the General Hydraulic Power Company, appeal against an assessment under Sched. D of 45,596*l.* less an allowance of 14,710*l.* for depreciation. The difference between the Crown and the appellants is as to the method of assessment.

The appellants own certain leasehold and freehold premises, and inasmuch as they carry on a trade on those premises, the Crown has assessed them on the "amount of the balance of the profits or gains of such trade," "upon a fair and just average of three years ending on such day of the year immediately preceding the year of assessment on which the accounts" have usually been made up. What the Crown has done is to take the aggregate profits in each of the three preceding years, and inasmuch as the appellants own these lands there has then been deducted from the aggregate profits the assessment under Sched. A for each of the years. Thus three balances are obtained, and the Crown has taken the average of those three balances, which amounts to 45,596*l.*, from which the sum allowed for depreciation is deducted. The appellants say that that method is wrong; that the right way is to take the average of the aggregate profits for each of the three years, and then deduct from that average the Sched. A assessment for the year of assessment, and from the balance so obtained deduct the allowance for depreciation, as to which there is a statutory provision requiring the deduction to be made in each year.

If the appellants rented these premises, instead of owning them, there is no doubt that the method adopted by the Crown would be the right method. Parliament has adopted a rough and ready working rule for assessing the profits of trades and professions. It assesses them before the commencement of the year in question, on the average of the three preceding years. The result is that in the case of a trader whose business is increasing, or of a rising professional man, income tax is always paid on a sum less than the actual income for the year of assessment, because the average is taken of the three preceding years when the professional income was smaller or the trade profits were less. In those cases the method of assessment operates in favour of the subject and against the Crown. On the other hand in the case of a decaying trade or of a professional man with a falling income, the income for the year of assessment is assessed on the average of years when the business or practice was larger and the tax is paid on an income which is larger than that which is really made in the year of assessment. In those circumstances the rule works in favour of the Crown, but, taking it one way with the other, Parliament seems to have thought it to be a rough working rule which renders it possible to calculate before the commencement of the year of assessment what may be called the conventional income for that year.

I have already pointed out that if the company had rented these lands there is no doubt that the method of calculation adopted by the Crown would have been the right method. In each of the three preceding years of which the appellants took the average before arriving at the balance of their profits they would have deducted the rent of their premises as an outgoing, and they would have got three resultant net profits for the three years; they would have then taken the average, and they would have been assessed on that average. It would have been of no avail for the appellants to have said that they were paying 500*l.* a year more rent than they did in the years from which the average had been obtained. The working rule does not look at

1913

GENERAL HYDRAULIC POWER COMPANY, LIMITED v. HANCOCK.

Scrutton J.

the year of assessment; it only looks at the average of the balance of profits for the three preceding years. What then is the position, if the appellants, instead of paying a rent for the land, own it and get the benefit of occupying it for the purposes of their trade without paying any express sum for it each year? On this point, looking first of all at what is to be done in any particular year of which the average is being taken, I have the guidance of the House of Lords, because in *Russell* v. *Town and County Bank* (1), to which I have been referred, all the members of the House of Lords who delivered judgment treated it as being beyond dispute and as too clear for argument that the owner of premises which are exclusively used for business purposes can deduct their annual value in arriving at the balance of profits and gains. Lord Herschell said (2): "It is not disputed that the annual value of premises exclusively used for business purposes is properly to be deducted in arriving at the balance of profits and gains." Lord Fitzgerald said (3): "The annual value of them forms a proper deduction in estimating the balance of profits"; and Lord Macnaghten said (4): "I think that the deduction was properly and necessarily made in estimating the profits and gains of the bank which were chargeable with duty." Two of those learned Lords did not attempt to say why it is clearly a right deduction, but Lord Herschell did do so, for he said (2): "There may be a question where the right to make that deduction is to be found," and he thought it is to be deducted either by taking it as an element before arriving at the balance of profits and gains, or as included in a very broad construction of the provision relating to disbursements and expenses. I hesitate to rush in where Lord Herschell had some doubts about treading, but it does seem to me that if the question should become material on some future occasion it may very well be considered whether the right to make the deduction does not follow from the express words of the second rule applicable to both the first and second Cases under Sched. D: "The computation of the duty to be charged in respect of any trade, ... shall be made exclusive of the profits or gains arising from lands, tenements, or hereditaments occupied for the purpose of such trade . . . ." It is, I think, quite possible to read that as a direction that when you assess the profits of the trade carried on on lands, you are to assess the profits of the trade and the profits and gains arising from lands separately, and shall not include in the profits from trade profits or gains arising from lands. In the present case it seems to me that the result would be the same whichever one did. One either starts with 65,370*l.* and takes up the profits and gains arising from the lands, which by reason of the provisions of the Finance Act, 1898, cannot be more than the Sched. A assessment, and thus in giving the subject the Sched. A assessment you are giving him the utmost to which he is entitled, or you may start by giving him the utmost he is entitled to, namely, the Sched. A assessment, and then give him the balance as the assessable amount of profits and gains under Sched. D.

---

(1) 13 App. Cas. 418.

(2) Ibid. at p. 425.

(3) Ibid. at pp. 429, 430.

(4) Ibid. at p. 430.

I ought to have said, in dealing with the question of the deduction, that the Legislature when enacting the Finance Act, 1898, certainly seems to have assumed in s. 9 that a sum could be deducted on account of the annual value of premises used for the purposes of trade from the balance of profits assessable to Sched. D.

If, as Lord Herschell says, it is not disputed that the annual value of the premises is properly to be deducted, the question which I have to decide in this case is, when is it to be deducted? Is it to be deducted in each of the average years in order to obtain the profits and gains for that year, which is the contention of the Crown, or, as the appellants contend, is the deduction not to be made until you come to the year of assessment, so that, taking the average of the profits and gains made in the three preceding years, you are to deduct, not the annual value of the lands in the year in which the profits were made, but the annual value of the lands in another year, namely, the year of assessment? It seems to me that, just as in the case of rent it is quite clear that you must apply the outgoings to the year in which the profits were made, so in the case of annual value it is equally clear that you must apply that annual value to the year in which the profits were made from which you are making the deduction.

1913

GENERAL HYDRAULIC POWER COMPANY, LIMITED *v.* HANCOCK.

That is, in substance, the contention of the Crown in this case, and in my opinion the appeal therefore fails, and the decision of the Commissioners must be affirmed.

Appeal dismissed.

Solicitors for appellants: *Beale & Co.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

F. O. R.

C. A.

1914

Jan. 22.

[IN THE COURT OF APPEAL.]

WILLIAMS *v.* BWLLFA AND MERTHYR DARE STEAM COLLIERIES (1891), LIMITED.

Employer and Workman—Compensation—Infant Workman—Weekly Payments—Application to review—Probable Earnings—Date of Computation—Retrospective Award—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (16.).

Upon an application, under Sched. I. (16.) of the Workmen's Compensation Act, 1906, to review the weekly payment payable to a workman who was, at the date of the accident whereby he was injured, under twenty-one years of age, the arbitrator cannot properly award an increase of the weekly payment as from a date antecedent to the date of the application to review.

APPEAL from an award of the judge of the Glamorganshire County Court in an arbitration under the Workmen's Compensation Act, 1906.

On February 6, 1911, the applicant, who was under the age of twenty-one years, was certified by the certifying surgeon for the district in which he was employed by the appellants to be suffering from miner's nystagmus, and to be thereby disabled from earning full wages at the work at which he was employed. It was verbally agreed between the applicant and his employers, the colliery company, that he should be paid compensation at the rate of 10*s.* a week, and such compensation was in fact paid to him until April 20, 1911, when he was given work as a surface labourer at 26*s.* 1*d.* a week, he having been, previous to the accident, earning between 26*s.* and 27*s.* a week.

On September 23, 1913, the applicant, who had attained twenty-one on December 20, 1911, applied under Sched. I. (16.) of the Workmen's Compensation Act, 1906 (1), for an arbitration with respect to the review and increase of the weekly payment payable to him under the Act. By his application he claimed an increase as and from April 20, 1911, the date when he undertook work on the pit surface. The company by their answers to the claim submitted that the judge had no jurisdiction to grant an increase of compensation as claimed prior to the date of the application to review.

The case came on before the county court judge on October 13, 1913, when he ordered the company to pay to the applicant the weekly sum of 3*s.* as compensation for his disablement through the contraction of the disease, such weekly payment to commence as from February 6, 1912, and as from September 23, 1913, the said weekly payment of 3*s.* was to be increased to 4*s.* per week and to continue during the partial incapacity of the applicant or until the same should be ended, diminished, increased, or redeemed in accordance with the provisions of the Act. Against this award the company appealed. By their notice of appeal they asked for an order to vary the award by setting aside such portion of it as ordered them to pay an increase of compensation as from a date preceding September 23, 1913, when the request for a review was filed, on the ground that the county court judge had no jurisdiction to vary the agreement for compensation as from a date antecedent to September 23, 1913.

A. Parsons (*J. Sankey, K.C.*, with him), for the appellants. The county court judge had no jurisdiction in awarding an

---

(1) Sched. I. (16.) of the Workmen's Compensation Act, 1906, provides: "Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased, subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act.

"Provided that where the workman was at the date of the accident under twenty-one years of age and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding 50 per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding one pound."

C. A.
1914

WILLIAMS
v.
BWLLFA
AND
MERTHYR
DARE
STEAM
COLLIERIES
(1891),
LIMITED.

increase of the weekly payment to go back any earlier than the date of the initiation of the proceedings for a review: *Morton & Co.* v. *Woodward* (1); *Upper Forest and Western Steel and Tinplate Co.* v. *Thomas* (2); *Charing Cross, Euston and Hampstead Railway* v. *Boots.* (3) Cozens-Hardy M.R. in *Thomas's Case* (2) left the point open whether, if an application to review asks a declaration from a definite antecedent date, it is competent to the arbitrator to make an order which operates from that antecedent date. There is, however, no justification for making a retrospective order in this case. *Thomas's Case* (2) and *Boots' Case* (3) should be limited to what they actually decide. They were decisions upon the first part of par. 16, and not upon the proviso. The inquiry as to the probable earnings of the workman can only extend to the date when the request for a review is formulated, for it is then that the issue is raised between the employer and the workman. If this were not so the workman might lie by for four or five years and then apply for an increase dating back for a long period.

R. Vaughan Williams, K.C., and *A. T. James*, for the respondent. There is nothing in the Act to prevent the arbitrator from making an award dating back to what may be called the relevant date, whatever it may be.

Here an antecedent date is specified in the application to review and there is nothing which precludes the making of an award as from that date. The order of the county court judge was right. [*Southhook Fire Clay Co.* v. *Laughland* (4) was also referred to.]

Parsons in reply.

COZENS-HARDY M.R. The President is good enough to deliver judgment.

SIR SAMUEL EVANS, PRESIDENT. The question for decision in this case arises under the proviso which forms the second paragraph of clause 16 of the First Schedule of the Workmen's Compensation Act, 1906. Certain authorities have been brought to the notice of the Court to-day upon matters which do not arise at all upon this appeal, and therefore nothing need be said about those authorities. They stand where they stand, both as decisions and also with reference to the dicta which have been referred to. The question is from what date the learned county court judge acting as arbitrator can increase the amount of compensation to be paid to an infant under the proviso to which I have referred.

---

(1) [1902] 2 K. B. 276.
(2) [1909] 2 K. B. 631.
(3) [1909] 2 K. B. 640.
(4) 1908 S. C. 831.

In this particular case the applicant was injured on February 6, 1911, and was paid compensation at the rate of 10*s.* a week up to April 20, 1911. The application to review in order to have an increase under the proviso was made on September 23, 1913, and the actual proceedings resulting in the award of the learned judge were held on October 13, 1913. The proviso is entirely in favour of the infant. It does not comprise applications for the ending or for the diminution of the amount, as does the first part of the clause—it merely provides for an increase of the compensation to be paid to an infant in accordance with the scale which is laid down. Reading that proviso I think there is a clear indication of what the Legislature meant should be the date from which the increase should take place. It says that the amount of the weekly payment may be increased to any amount not exceeding 50 per cent. of the weekly sum which the workman probably would have been earning at the date of the review if he had remained uninjured. Obviously the policy is this. A man who is under twenty-one, before he attains manhood in the ordinary sense, may be injured, and it is not right for ever to fix the amount of compensation which he should have in accordance with what he was able to earn at the age at which he was when the injury was received. In most cases the youth grows up, and as he grows up his earning capacity increases and his earnings are actually increased. That being so, it would be right if he is injured at a more or less tender age that he should have a progressive scale in order to compensate him for the injury in accordance with the progress of his ability to earn. Now the date of the review is taken for the purposes of this case as September 23, 1913—that in fact is the application for review; but the employers, who appeal here, are content to take that as the date of the review

C. A.
1914

WILLIAMS
v.
BWLLFA
AND
MERTHYR
DARE
STEAM
COLLIERIES
(1891),
LIMITED.

The President.

and not to press for the actual date of the proceedings when the award was made. Upon that date, therefore, September 23, 1913, the learned judge ought to have inquired what would probably have been the earnings of this applicant at that date if he had not been injured. I see no evidence before us at all and no reasons were given by the learned county court judge which would lead us to believe that there was any evidence that he directed his mind to that question, and it is still left in doubt both at the Bar and on the Bench as to what, if any, fixed date was taken by the learned county court judge in asking himself that question, which he ought to have asked under this proviso. Assuming that the date of the review was September 23, 1913, was it intended by the Legislature that, the earning capacity of the applicant at that date having been ascertained without any inquiry as to what might have been his probable earnings for the previous year and seven months, taking the facts of this case, the increase should be made not as from the date when evidence was given as to the probable earnings, but as from some date long anterior to that? As was pointed out in the course of the argument, it might be that the increased earning capacity of the workman was entirely subsequent to the date of February 6, 1912, and yet the learned judge here, if he applied his mind to the proper question, namely, what were the probable earnings on September 23, 1913, has given a percentage of those earnings from a date about which he did not inquire at all. The case might be disposed of, I think, upon the ground that there was no evidence at all to support the learned county court judge's findings, but we have been invited to give a construction to this section, and the construction which I think it ought to receive in order to give effect to its plain meaning is that the youth, if at any time more than twelve months after the accident he thinks he would then probably be earning more than he was at the time of the accident if he had remained uninjured, can apply to review, and the judge must then ask himself what would have been his probable earnings at the time of the review; and give a percentage of that. That has not been done in this case, and I think, therefore, the employer's appeal succeeds and must be allowed with costs.

C. A.
1914
Williams
v.
Bwllfa
and
Merthyr
Dare
Steam
Collieries
(1891),
Limited.

Eve J. I agree.

It is important to make it quite clear that this appeal falls to be determined upon the proper construction to be attached to the proviso. Paraphrasing that proviso it comes to this: if the injured workman was an infant at the date of the accident and if the review takes place more than twelve months after the accident the Court may inquire what the applicant probably would have been earning at the date of that inquiry and may award as compensation any part of the sum so found up to 50 per cent. thereof; that is to say, the compensation is fixed not with regard to the actual earnings, but with regard to what the workman would probably have been earning at a particular moment of time had he remained uninjured. It is not open in my view to the learned judge, having found that the workman would be earning a particular wage at a particular moment of time, to assume, without evidence, that he would have been earning that same amount of wages at an antecedent date, and to throw back the operation of the order to such antecedent date. The order in my opinion operates, and can only operate, from the moment of time at which the inquiry is to be answered; that is to say, the moment of time at which the inquiry is initiated.

In this case the material fact was never ascertained. There was no evidence to shew what the workman would probably have been earning at the relevant date, and for these reasons I think the order which the judge made was unjustified, both with regard to the evidence, and also as not being in accordance with the proper construction of the proviso.

Cozens-Hardy M.R. I agree.

Appeal allowed.

Solicitors: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare; Smith, Rundell & Dods, for Morgan, Bruce & Nicholas, Pontypridd.*

G. A. S.

C. A.

1914

Jan. 22.

[IN THE COURT OF APPEAL.]

GOTOBED *v.* PETCHELL.

Employer and Workman—Compensation—Weekly Payments—Review—Application by Employer—Diminution and/or Redemption—Withdrawal of Application as to Redemption—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (16.), (17.).

Where an employer applied, under the Workmen's Compensation Act, 1906, for a review in respect of the diminution or redemption, or both, of a weekly payment which had been awarded to a workman injured by accident while in his employ:—

Held, that he was entitled to withdraw the application as to redemption and proceed upon it as to diminution.

Calico Printers Association v. *Booth* [1913] 3 K. B. 652, explained.

Appeal from an award of the judge of the Norfolk County Court sitting at Downham Market as arbitrator under the Workmen's Compensation Act, 1906.

The appellant, Gotobed, was a farmer, and the respondent, Petchell, was an agricultural labourer in his employ. On January 3, 1912, Petchell was injured while assisting in the loading of some calves into a train at the railway station. His wages were 13*s.* a week. As a result of the accident he was incapacitated, and received compensation amounting to 6*s.* 6*d.* a week until December 19, 1912. An award was then made by consent under which he received 5*s.* a week. On August 22, 1913, the appellant filed a request for arbitration with respect to the review and/or diminution of the weekly payment. In the particulars of the application, under the heading of "Relief sought by applicant, &c.," were inserted the words "Diminution and (or) redemption," the ground of the application being that the respondent was well able to do light work. On September 6, 1913, the workman filed an answer to the application, admitting the right of the employer to redeem on the footing that the workman was not capable of doing his former work. On September 12 the employer served upon the workman a notice of the withdrawal of his application so far as it related to redemption.

The arbitration was heard on October 3, 1913, when the county court judge (Judge Mulligan, K.C.) was of opinion that if the application had been for diminution only the weekly payment ought to have been reduced to 3*s.* 9*d.* until further order. He thought, however, that having regard to the decision of the Court of Appeal in *Calico Printers Association* v. *Booth* (1) he was bound to hold that when an employer had applied to redeem and the workman had admitted his liability to be redeemed the employer ceased to be dominus litis and could not withdraw his application to redeem. Under those circumstances he awarded the workman the sum of 150*l.* by way of redemption, but if on appeal that award should not be maintained, then he ordered the weekly payment to be reduced to 3*s.* 9*d.*

The employer appealed.

Shakespeare (*J. Sankey, K.C.,* with him), for the appellant. The county court judge was wrong in law in holding that the application so far as it related to redemption could not be withdrawn or discontinued. After it had been withdrawn he had no jurisdiction to make an order for redemption.

The decision in *Calico Printers Association* v. *Booth* (1) has no application to the present case.

[He was stopped by the Court.]

Hollis Walker, K.C., and *D. N. Pritt* (*Claughton Scott* with them), for the respondent. In *Calico Printers Association* v. *Booth* (1) it was said that the word "may" in Sched. I. (17.) of the Act must not be taken as giving the employer the right to experiment. This case is another attempt to experiment, analogous to that which was not allowed in *Booth's Case.* (1)

[Cozens-Hardy M.R. referred to *Dixon* v. *Patton* (2), a case decided by the Court of Appeal in Ireland upon Sched. I., r. 13, of the Workmen's Compensation Act, 1897, which corresponds with Sched. I., clause 17, of the Act of 1906.]

When once an arbitration is initiated it amounts to a submission which is irrevocable.

Cozens-Hardy M.R. This appeal raises a curious point. An application was made by the employer for a diminution of the

---

(1) [1913] 3 K. B. 652.

(2) (1905) 120 L. T. Journ. 170.

C. A.
1914

GOTOBED
v.
PETCHELL.

Cozens-Hardy M. R.

weekly payment which had been made under an existing award—diminution and/or redemption. I assume, without deciding it, that that form was not open to objection. After that was filed the workman put in an answer and objected to it, and before the matter came on for hearing the employer gave the following notice in writing: "Take notice that the applicant in this arbitration withdraws his application so far as it relates to the question of redemption." It was nevertheless contended that the employer could proceed on the application for diminution. When the matter came before the learned county court judge he took the view that there was something in the recent decision of this Court in the case of *Calico Printers Association* v. *Booth* (1) which supported the view that an application for redemption could not be altered or withdrawn. It has been frankly admitted by Mr. Hollis Walker, who has said everything that can be said in this case, that *Booth's Case* (1) decided nothing of the kind. *Booth's Case* (1) only decided this, that when there is an application to redeem, when evidence is taken, when the case is heard out and the county court judge thinks that x pounds is the proper sum to be awarded, he cannot make his award in the form that if the employer chooses to pay x pounds he may do so; he must under those circumstances make a positive award for x pounds. That is the first, last, and sole effect of that judgment. The learned county court judge seems to have thought that but for his incorrect view of *Booth's Case* (1) he ought to follow the decision of the Irish Court of Appeal in the case of *Dixon* v. *Patton*. (2) There there was an application for redemption, and when it came before the county court judge the applicant said he did not wish to proceed, and he did not open the case. The county court judge dismissed the application, and the Court of Appeal said that the procedure for redemption was only a form of litigation and that the party who set it in motion had the ordinary right to discontinue it that any other litigant had on paying the costs that the other side had incurred. The learned county court judge here very wisely made an award in an alternative form: if his award for 150*l.* cannot be maintained, then he states the figure by which the amount of the weekly payment ought to be diminished. I think with great respect to his

---

(1) [1913] 3 K. B. 652.

(2) 120 L. T. Journ. 170.

Honour that this judgment cannot be sustained, that the view of the Irish Court of Appeal is right, and that this appeal must be allowed, so that there is no award for redemption, but there is simply an award for diminution.

Sir Samuel Evans, President. I agree.

Eve J. I also agree.

Appeal allowed.

Solicitors: *William Hurd & Son, for Dudley S. Page, King's Lynn; Field, Roscoe & Co., for Sadler & Woodwark, King's Lynn.*

G. A. S.

[IN THE COURT OF APPEAL.]

C. A.
1914
Jan. 13, 28.

PARKER *v.* OWNERS OF SHIP BLACK ROCK.

Employer and Workman—Compensation—Accident arising out of Employment—Sailor—Return to Ship—Ashore to buy Provisions—Agreement by Crew to find their own Provisions—Ship's Business—Statutory Agreement—Workmen's Compensation Act, 1906 (6 *Edw.* 7, c. 58), *s.* 1, *sub-s.* 1.

A fireman on board the steamship *Black Rock* went ashore, with leave, to buy provisions. When he endeavoured to return to the ship she had been moved and the night was rough and dark; he fell into the sea and was drowned. His widow claimed compensation under the Workmen's Compensation Act, 1906, from the owners of the ship on the ground that at the time of the accident the deceased was fulfilling a contractual obligation and was employed on ship's business. His contract of service was contained in a document issued by the Board of Trade under ss. 114 and 116 of the Merchant Shipping Act, 1894. Particulars of the ship and her owners were given, and an agreement by the persons whose names were subscribed to serve on board the ship in their respective capacities; and (in the printed form) the master agreed to pay them their respective wages and to "supply them with provisions according to the scale printed on p. 15 of this book." The words as to supplying provisions were struck out in this case, and across p. 15 the words "crew to provide their own provisions" had been written:—

Held (Sir Samuel Evans, President, dissenting), that there was no contractual obligation on the deceased to supply his own provisions; that in going ashore to order provisions he was acting for his own purposes, and not on ship's business; and that his widow was not entitled to compensation.

Appeal from an award of the county court judge of Liverpool, sitting as arbitrator under the Workmen's Compensation Act, 1906.

C. A.
1914

Parker
v.
Owners
of Ship
Black Rock.

The facts were stated by Eve J. as follows. At some time between 2 and 6.30 in the afternoon of January 14, 1913, Christopher Parker, a fireman on board the steamship *Black Rock*, then moored alongside the north pier at Newlyn in Cornwall, went ashore with another fireman named James McDermott. They visited a beer shop and then about 6.30 a provision shop near the land end of the north pier. The two men purchased separately bread, butter, bacon, potatoes, tea and other goods to the value of about 7*s.*—these goods they left with the tradesman to be sent aboard the ship. On emerging from the shop McDermott returned to the beer shop; Parker made towards the spot on the north pier where the *Black Rock* had been moored when he left her, and this was the last time he was seen alive. The night was very rough and boisterous, a gale of wind was blowing and it was raining—moreover in Parker's absence the ship had been removed from her moorings at the north pier and taken across to the south pier, and the unfortunate man fell, or jumped, or was blown off the north pier and was drowned.

The claim of his widow and sole dependant to compensation from the owners of the ship has been rejected in the county court on the ground that she has not proved that the accident by which her husband met his death arose out of his employment. The widow has appealed and the question we have to determine is whether this conclusion is right in law.

The contract of service is contained in a document issued by the Board of Trade under ss. 114 and 116 of the Merchant Shipping Act, 1894, and indorsed "Half-yearly agreement and account of voyages and crew of a ship engaged in the home trade only, and official log book of a vessel exclusively employed on the coasts of the United Kingdom." The greater part of it is in print with spaces left for the filling up of the statutory and relevant particulars. It is stated as being "executed in sixteen pages," which I take to be equivalent to a statement that it consists of sixteen pages.

On p. 1 are particulars of the ship, her port, tonnage, &c., and her owners and master, and then an agreement by the several persons whose names are subscribed to serve on board the said ship in the several capacities expressed against their respective names,

C. A.
1914

PARKER
v.
OWNERS
OF SHIP
BLACK ROCK.

and to conduct themselves in an orderly, faithful, honest and sober manner and to be obedient to the master and so on, and then as printed it proceeds as follows: "in consideration of which services to be duly performed the said master hereby agrees to pay to the said crew as wages the sums against their names respectively expressed and to supply them with provisions according to the scale printed on page ( ) of this book." That blank would properly be filled up with the figure 15. But the words I have last read "and to supply them with provisions according to the scale printed on page ( ) of this book" were struck out in this case, because the master and crew agreed, as they were entitled to do, that the obligation to supply provisions should not be imposed upon the owners.

There follow on p. 1 some further stipulations for maintenance of discipline and the conduct of the ship's business, and at the foot of the page above the master's signature are the words "In witness whereof the said parties have subscribed their names on the following pages on the days against their respective signatures mentioned."

Pages 2 to 9 inclusive contain spaces for the signatures of the crew and for full particulars of each man's engagement, discharge and release. Pages 10 to 13 are reserved as the official log book, and p. 14 for particulars of consular and other certificates therein mentioned.

On p. 15 are, first, particulars of the ship's load line and draught, and then an important paragraph and table headed "Regulations for maintaining discipline." It will, however, be seen that these regulations form no part of the agreement. The second sentence of the paragraph reads: "These regulations are all numbered and the numbers of such of them as are adopted must be inserted in the space left for that purpose in the agreement, page 1, and the following copy of these regulations must be made to correspond with the agreement by erasing such of the regulations as are not adopted. The signature or initials of a superintendent of a mercantile marine office or consular officer before whom the agreement is made must be placed opposite such of the regulations as are adopted." Turning back to p. 1 it will be seen that none of these regulations were adopted in this case. Page 15 concludes with the scale of provisions to be observed when the owners contract to supply provisions, and across this is written the words "Crew to provide their own provisions," which are relied on as constituting an express agreement by the deceased and other members of the crew to supply their own food.

The county court judge made an award in favour of the respondents and the applicant appealed.

Howard Jones, for the appellant. The deceased workman was under an obligation to find his own provisions; he was drowned whilst employed on ship's business, and the accident arose out of his employment. *Mitchell* v. *Owners of S.S. Saxon* (1) is not an authority to the contrary, for the Court only declined to interfere with the findings of fact of the learned county court judge, and the workman was under no obligation. Here he had not gone ashore for his own purposes and the principles laid down in *Moore* v. *Manchester Liners* (2), *Kitchenham* v. *Owners of S.S. Johannesburg* (3), and *Gilbert* v. *Owners of Steam Trawler Nizam* (4) do not apply. He was ashore in the course of his employment: *Macdonald* v. *Owners of S.S. Banana.* (5) He was under an express contract of service to perform this errand and the accident happened through a risk incidental to the errand. He was obliged to procure provisions to keep himself in health: Merchant Shipping Act, 1894, s. 160. As a general rule the master of every ship has to furnish provisions for the crew: Merchant Shipping Act, 1906, s. 25; but this is a special contract and the crew are "to provide their own provisions." Formerly sufficient stores were a condition of seaworthiness: *Stewart* v. *Wilson* (6); *Woolf* v. *Claggett* (7); Abbott's Law of Merchant Shipping, 14th ed., p. 499. The form of the contract is regulated by ss. 113, 114, and 122 of the Act of 1894 and is quite correct; an obligation might also be inferred from the circumstances.

---

(1) (1912) 1 W. C. Rep. 368.

(2) [1909] 1 K. B. 417; [1910] A. C. 498.

(3) [1911] 1 K. B. 523; [1911] A. C. 417.

(4) [1910] 2 K. B. 555.

(5) [1908] 2 K. B. 926.

(6) (1843) 12 M. & W. 11.

(7) (1800) 3 Esp. 258.

C. A.
1914

PARKER
v.
OWNERS
OF SHIP
BLACK ROCK.

Alexander Neilson and *W. Greaves Lord*, for the respondents. The only point is whether the deceased man's visit to the shore was on ship's business or not. It has been decided that a sailor engaged under a condition that he should find his own food and meeting with an accident such as this is not within the protection of the Act: *Dixon* v. *Owners of S.S. Ambient.* (1) This was not going ashore on ship's business; it was more like the conduct of a man who goes home for dinner. He went to buy food for his own purposes. The words "crew to provide their own provisions" did not form part of the contract and he was under no obligation. The words were only inserted for the information of the marine superintendent. The crew can always provide their own food if they like. Sect. 25 of the Merchant Shipping Act, 1906, only says the master shall provide food for those who do not provide for themselves. In face of the authorities the appellant could not argue this case at all if it were not for the terms of this contract, and they do not help him. They are in the ordinary form and do not impose any contractual obligation.

Howard Jones in reply. A decision in favour of the appellant would not have a far-reaching effect, for the case depends on the words of this particular contract. The words "crew to provide their own provisions" were inserted by the owners, and it is not open to them to say that they are not part of the contract: *Cremins* v. *Guest, Keen & Nettlefolds.* (2)

Cur. adv. vult.

Jan. 28. COZENS-HARDY M.R. The material facts in this case have been so fully stated by the President and by Eve J. in the judgments they are about to read that I shall content myself with dealing with the questions of law upon which there is a difference of opinion.

It is beyond dispute that where a sailor meets with an accident on shore while fulfilling an obligation imposed upon him by his contract of service, the accident arose out of and in the course of his employment. For example, if the master sends him ashore on ship's business, and he is knocked down by a runaway horse.

(1) (1912) 1 W. C. Rep. 224.

(2) [1908] 1 K. B. 469.

C. A.
1914

PARKER
v.
OWNERS
OF SHIP
BLACK ROCK.

Cozens-Hardy
M.R.

It is equally beyond dispute that where a sailor meets with an accident while on shore with permission but for his own purpose, the accident did not arise out of and in the course of his employment. For example, if he goes ashore to see a show or to visit a friend.

It has been suggested that the second proposition is subject to this qualification, that if the purpose is one which is reasonably necessary to enable him to discharge his duties as a seaman, he ought to be in the same position as if he were performing a contractual obligation.

In my opinion, there was no contractual obligation by the deceased fireman towards the shipowners that he would provide his own provisions. By statute the owners are bound to supply provisions according to a scale printed at p. 15 of the articles, unless the crew provide their own provisions. The words in the printed form (p. 1) imposing this obligation on the owners were struck out. The scale at p. 15 was obviously useless, and it was also struck out, the words " crew to provide their own provisions " being written across. Those words amount in my opinion only to a statement that the scale has no application. To hold that these words impose a contractual obligation on the crew, for breach of which an action would lie, seems to me unreasonable. I agree with Eve J.'s judgment on this point. In going ashore to order groceries, &c., the deceased man was only acting in his own interest and for his own purposes.

I am not sure that the appellant's counsel, who argued the case with great ability, seriously contended that the appeal could be maintained apart from the alleged express contract in the articles. But in one stage of his argument he relied upon an implied obligation on the deceased to do what was necessary to keep himself alive and in a fit condition to discharge his duties on the ship, and that therefore he went ashore on ship's business. In my opinion this is an extension of the term ship's business for which there is no warrant. It has been repeatedly held that the protection of the Act does not extend during the time when a workman leaves the factory or shop to go to his own house for the purpose of getting food and drink, without which he could not work. I can draw no distinction between a fireman on a ship and a fireman attending to boilers in a factory.

In my opinion the applicant has failed to establish that the accident arose out of and in the course of the employment, and the decision of the county court judge was correct.

Sir Samuel Evans, President. I greatly regret that the consideration of this case has led me to a different conclusion from that which has been expressed in the judgment delivered by the Master of the Rolls. The question for decision in the case is whether the accident which caused the death of the applicant's husband arose out of his employment. It was not contended that it did not arise in the course of his employment. The material facts, stated simply, are as follows.

The deceased man was a fireman on board the respondents' ship. He signed the ship's articles on January 7, 1913, for a round coasting voyage. The agreement would expire on June 30, 1913. By the agreement the employers relieved themselves of any obligation to provide food for the crew according to the scale of ship's provisions prescribed by the Merchant Shipping Acts. According to the ship's papers, the "crew were to provide their own provisions." The deceased on January 14, 1913, in the course of the ship's voyage went on shore to buy the necessary provisions for himself. When he left the ship she was moored in a port at a berth near some steps at the end of a pier about 1500 feet long. Before he returned the ship had been shifted from that berth to another alongside a different pier, without his knowledge; and her first berth was occupied by another vessel of smaller size. He bought his provisions, and was returning directly from the provision stores to where the ship lay when he went on shore. His way was along the pier first referred to. The pier was not well lighted. The weather was very dark and rainy. It was a dirty night, and a gale of wind was blowing at a velocity of fifty to sixty miles an hour. "You would go a long time to get a worse night." The lamps did not throw a good light on such a night. At the end of the pier near where the ship had been first berthed there was no protection. That spot was dangerous on a dark and stormy night. The deceased in proceeding towards the berth fell into the sea at or near the place where the ship was moored when he left her, and he was drowned.

These facts were sufficiently established by evidence or by inferences properly drawn by the learned county court judge. The deceased, in the circumstances, had to face the danger which proved fatal: and it appears to me that the danger was one directly incident to his employment. Apart from any decisions under the Act, if I were asked whether in these circumstances the accident which befell him arose out of and in the course of his employment, I should unhesitatingly answer that it did.

The learned county court judge would clearly have answered in the same way (having found all the facts, and properly drawn all the inferences of fact to enable him to do so), if he had not thought he was precluded by the decision of *Mitchell* v. *Owners of S.S. Saxon.* (1) That case depended upon its own facts, and it lays down no principle which would prevent a decision in favour of the applicant in the present case.

I do not propose to discuss again the numerous cases upon the question of when an accident arises out of and in the course of an employment. That has often been done. To adopt the words of Lord Loreburn L.C. in *Kitchenham* v. *Owners of S.S. Johannesburg* (2), "The words 'out of and in the course of the workman's employment' admit of inexhaustible varieties of application according to the nature of the employment, and the character of the facts proved. The facts in different cases are infinitely different; and, if we were upon each argument to discuss them, and to differentiate one from another, judgments in Courts of law would be interminable, and would lead rather to confusion than to enlightenment."

In my opinion this case can be decided in favour of the applicant without conflicting with any principle laid down in any authority binding upon this Court. It was contended for the respondents that the deceased went on shore for his own purposes and on his own business, and not for ship's purposes or on ship's business; and, accordingly, that as he had not actually reached the vessel the accident did not arise out of his

(1) 1 W. C. Rep. 368.

(2) [1911] A. C. 417.

employment. In one sense, his buying of provisions was his own business; but in another, and a very real sense, it was part of the ship's business that he should procure the food necessary to enable him to do his work as one of her crew, and so perform his share in the work without which the ship's voyage could not be completed or continued. His employment was continuous during day and night, on board and on shore, unless he travelled outside the employment for purposes foreign to it. Such an employment was described by Fletcher Moulton L.J. as follows: "His employment is continuous, and there is no moment when he, whether on board or on shore, is not bound to obey the captain's orders." (See *Moore* v. *Manchester Liners* (1).) His errand was no less an errand on ship's business, than if he had been sent by the ship's master to fetch provisions for the crew, or for himself, if the shipowners had to provide the food. It was an errand of the same character and entailing the same consequences as if in the event of his illness the master had sent another of the ship's crew on shore to procure the necessary provisions for him; or as if one of the engineers had, either in the ordinary course of his duty, or by the master's orders, to go ashore to get the oil necessary for the engine room. It was contended for the respondents that it was no part of the contract between the deceased and the employers that he should procure provisions for himself; that all that was done was that the employers contracted themselves out of the obligation prima facie resting upon them under the Merchant Shipping Acts; that that left the seaman to provide food for himself apart from any contract express or implied; and that therefore in going ashore to buy provisions he was merely going for his own purposes.

In my opinion it is not necessary, in order to hold the employers liable for the accident, to establish that the seaman bound himself expressly or impliedly by contract to procure his own food during the voyage. I think it is clear that if there was no such express contract by him, such a contract would be implied. But whether there was such a contract express or implied, or not, it was a natural and necessary incident of his employment that the seaman should provide his own food; and

---

(1) [1909] 1 K. B. at p. 422.

C. A.
1914

PARKER
v.
OWNERS
OF SHIP
BLACK ROCK.

The President.

in going on shore to purchase it, and in returning to the vessel after doing so, he was doing a thing which was not only incidental but essential to his employment, and without which his employment and his work as one of the ship's crew would come to a speedy and unhappy end. But if it were necessary to establish that the seaman expressly contracted that he would provide his own food, that has been done in this case. The ship's articles and the agreement with the crew were not produced at the trial. The agreement was proved orally by the master (who was called by the applicant) apparently under s. 123 of the Merchant Shipping Act, 1894. He said "The deceased was a fireman on board. He had signed the articles. The Board of Trade's scale of provisions was crossed out and 'crew to provide their own provisions' inserted." This was not challenged. At the trial, therefore, the county court judge was entitled to find that by the contract between the master and the crew an obligation was imposed upon the deceased to provide his own food.

Upon the hearing of this appeal the written articles and agreement were produced. It is well known that seamen are favourites of the Legislature, and their agreements and engagements of service are hedged round with elaborate statutory safeguards. The document consists of sixteen pages (see p. 1). It is issued in a form prepared and authorized by the Board of Trade. The signature of the master was on p. 1; and of the deceased on p. 2. On p. 15 were contained certain particulars, namely, of the load line, which by statute are required to be inserted in the agreement. (See Merchant Shipping Act, 1894, ss. 440, &c.; and Merchant Shipping Act, 1906, s. 8.) On the same page there was originally set out in print the scale of provisions required by s. 25 of the Merchant Shipping Act, 1906, to be allowed and served out to the crew during the voyage, except in cases in which the crew furnished their own provisions, and there was written across the scale "Crew to provide their own provisions." I think these words formed part of the agreement, and bound the crew. I do not think a copy of the agreement, which must be posted up under s. 120 of the Merchant Shipping Act, 1894, would be complete without these words. I am of opinion that the seaman contracted expressly to provide his own food. But if he did not, I think, as I have said, that it was an implied term of the contract that he would do so.

The only decisions to which I think it necessary to refer are those of *Moore* v. *Manchester Liners* (1) and *Kitchenham* v. *Owners of S.S. Johannesburg.* (2)

In the former case, Fletcher Moulton L.J. in the Court of Appeal, in a judgment which was approved by the House of Lords, said (3): "In the present case—that of a fireman on a ship—the employment is a continuous one, not ceasing during the time that the ship is in port, and it must have been contemplated between the parties that from time to time he would be permitted to go on shore to obtain needful supplies of various articles; and the evidence as to the selection of Sabbath's store, and its announcement to the crew as the authorized house for purchases, would itself be conclusive on this point if specific evidence were needed. Such visits on shore were therefore, to my mind, normal incidents of the employment, and an accident due to the dangers of access to the ship when the fireman in the course of his duty was returning thereto on such an occasion appears to me to be a typical example of an accident arising out of and in the course of his employment under the general principle which I have above enunciated. In my opinion it would be a lamentable and unjustified limitation of the scope of the Act if we were to exclude such an accident from the benefit of its provisions simply because the sailor had not actually set his foot on the ship when it occurred." And Lord Loreburn L.C., in the House of Lords (4) said: "A seaman for example who is ashore on leave and is knocked down by a waggon is not injured by an accident arising out of his employment. But if he is sent ashore on ship's business he is doing that errand in the same position as a messenger, and is protected against the same risks." And in the latter case, Fletcher Moulton L.J. in the Court of Appeal, in a judgment which was again approved of in the House of Lords, said: "But if, whether in his hours of leisure or not, it becomes necessary for him in fulfilment of his employment to get on board his vessel, an accident occurring in his doing so is normally an accident arising out of his employment, because it is due to a danger incidental to his service in that ship." And in another passage he said: "I do not think that the dividing line is when he actually touches the ship, or the special means of access thereto. For instance, if it was shewn that when the sailor returned to the ship there was a dense fog, and that in trying to find the gangway, which I will suppose was not lighted, he fell into the water and was drowned, I think that the accident would arise out of his employment." Other passages containing some qualifications applicable to that case appear in the judgment which do not seem to be applicable to the present case. The two cases referred to were cases where it was found that the sailor went ashore on leave for his own purposes.

---

(1) [1909] 1 K. B. 417; [1910] A. C. 498.

(2) [1911] 1 K. B. 523; [1911] A. C. 417.

(3) [1909] 1 K. B. 428.

(4) [1910] A. C. at p. 501.

In my opinion the case now before the Court is stronger in favour of the applicant than the two cases just referred to, for the reasons already stated, namely, that the deceased fireman in this case went ashore in pursuance of a duty arising either under an express or implied contract, or at any rate a duty not only to himself but to his employers also, the performance of which was essential to his engagement and employment.

I may add that it is immaterial in my view whether the accident in the present case happened to the deceased while on the quay in approaching the steps, or while on the steps in approaching the berth, or a gangway which he had reason to believe was there to form an access to the ship, or while attempting from the steps to reach such a gangway, or to get on to the ship. The danger he ran in approaching the ship at the end of an unprotected pier on such a night and which proved fatal to him was a danger incident to his employment; he encountered the danger in the course of his employment; and in encountering it, the accident which befell him in my opinion arose out of his employment; and his widow as a dependant was entitled to the benefit of the Workmen's Compensation Act.

I think therefore that the appeal ought to be allowed with costs, and the case remitted to the county court judge as arbitrator to assess the compensation to which the applicant is entitled.

Eve J. stated the facts as above and proceeded: On behalf of the widow it has been strenuously contended that the contract of service between the deceased and the shipowners included an express term whereby the deceased and other members of the crew contracted to provide their own provisions, and that the deceased at the moment when he met his death was in fact discharging this term of his contractual obligations. If this argument is well founded I think it follows the accident arose out of the employment. But I am not able to adopt the view that the expression on which counsel for the widow so much relied does involve the inclusion in the contract of the express term I have mentioned. [The learned judge stated the terms of the contract.]

The object with which I have made this detailed examination of the document has been to ascertain whether there is any ground for holding that the written statement on p. 15 forms part of the agreement, and in my opinion there is not. I think the whole agreement between the owners and the crew is to be found on p. 1, and although, no doubt, in a case where the owners undertake to supply provisions the scale on p. 15 must be read into and forms part of the agreement, it forms no part thereof in a case like the present where there is no reference to it on p. 1. In this case the " Scale of Provisions " is in exactly the same relation to the agreement as are the regulations on the same p. 15 " for maintaining discipline," that is to say, neither of them has any application, and in these circumstances I think that the written words " Crew to provide their own provisions " are no more than a statement that the scale has no application. In my opinion, therefore, the appeal fails so far as it is founded on the contention that the deceased met his death in discharging an obligation imposed upon him by the express terms of his contract of service.

There remains the question whether, apart altogether from any express contract, the deceased was not so far engaged on ship's business in laying in the stock of provisions as to render his death due to an accident arising out of his employment. I am not sure how far this contention was persisted in by counsel for the appellant, but it is one with which perhaps we ought to deal.

C. A.
1914
PARKER v. OWNERS OF SHIP BLACK ROCK.
Eve J.

In determining on which side of "the narrow dividing line" established in *Kitchenham* v. *Owners of S.S. Johannnesburg* (1) this case falls, the following considerations seem to me to be material: (1.) There is no evidence of the purposes for which or of the time or circumstances at or in which the deceased left the ship. The evidence is quite consistent with his having gone ashore solely for his own purposes. (2.) He was last seen walking in a direction which would not have taken him back to the ship and he met his death at a spot from which he could not have reached his ship without retracing his steps the whole length of the north pier and starting afresh from shore along the south pier. (3.) Although his conduct in going along the north pier is indicative of his not knowing that the ship had been shifted from the north to the south pier, there is no evidence as to his state of knowledge on this point.

To these considerations I may perhaps add this further one, that to hold that the question whether an accident arises out of a man's employment or does not so arise is dependent in any degree upon the fact whether—being obliged to sustain himself with food—he goes ashore and there buys and consumes it, or whether he brings it aboard and there consumes it, would be to introduce yet one more element of uncertainty into the construction of this difficult sub-section. I think therefore we ought to hold that the applicant here has failed to establish affirmatively that this man's death was occasioned by an accident arising out of his employment.

In my opinion the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Griffiths & Roberts, for R. E. Warburton, Liverpool; Holman, Birdwood & Co., for Rogers & Birkett, Liverpool.*

---

(1) [1911] 1 K. B. 523, 527; [1911] A. C. 417.

H. C. R.

[IN THE COURT OF APPEAL.]

C. A.
1914
Jan. 20.

LLOYD *v.* MIDLAND RAILWAY COMPANY.

Employer and Workman—Compensation—" Concurrent contracts of service" —Ejusdem generis—Rules of Service—Workmen to " devote themselves exclusively to the company's service" — " Average weekly earnings" — Workmen's Compensation Act, 1906 (6 *Edw.* 7, c. 58), *Sched. I., par.* 2 (*b*).

A platelayer in the service of a railway company, whose wages were 21*s.* a week, and his working hours from 6 A.M. to 5.30 P.M., and noon on Saturdays, also worked at a theatre from 7 P.M. to 10.30 P.M. at 7*s.* a week. He met with an accident on the railway and applied for compensation from the railway company under the Workmen's Compensation Act, 1906, claiming 14*s.* a week on the footing that he was entitled to have his earnings at the theatre taken into consideration as well as those in the service of the company. The company contended that his contract of service with them was governed by " Rules and Regulations for the guidance of the officers and men " in their service, printed in a small book which the applicant admitted he had received, but of which he said that he did not know the effect. By rule 1 " all persons employed by the company must devote themselves exclusively to the company's service." . . . . By rule 11 " No servant of the company is allowed to trade " . . . . and by rule 243 inspectors were to keep registers of the names and addresses of all employees so that they might be able in case of accident to summon them immediately:—

Held that, assuming that rule 1 formed part of the contract of service, it meant that all persons employed by the company must, whilst they were doing the company's work, devote themselves exclusively to the company's service; that the company could not interfere with their workmen in the hours when they were not actually doing their work; that workmen were not bound under rule 243 to hold themselves at all times in readiness for emergencies; that there were concurrent contracts of service and there was nothing in the Act to shew that such contracts must be ejusdem generis.

APPEAL from an award of the judge of the Liverpool County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

James Lloyd was a platelayer in the service of the Midland Railway Company at 21*s.* a week, and he also worked in a theatre at Bootle in the evenings as checktaker. He had worked at the theatre for two years before he joined the railway, which he did

C. A.
1914

LLOYD
v.
MIDLAND
RAILWAY.

on January 31, 1913. His hours of work with the railway were from 6 A.M. to 5.30 P.M., and noon on Saturdays. He worked at the theatre from 7 P.M. until about 10.30 P.M. There was a conflict of evidence as to the terms on which he was appointed to work for the company; he admitted that he had received a copy of the rule book of the company, but said that he did not know the effect of the rules. His wages in both employments were paid weekly. On April 16, 1913, he met with an accident on the railway, and on May 21 he applied for an arbitration to obtain compensation from the railway company, claiming 14*s.* a week on the footing that he was entitled to have his earnings at the theatre taken into consideration as well as those on the railway.

The railway company alleged that the applicant entered their service as a labourer in the engineers' department, and that the terms of the contract between them and the applicant were contained in a small book produced by them called "Rules and Regulations for the guidance of the officers and men in the service of the Midland Railway Company." It contained a notice of a resolution of the directors "that the following rules and regulations be, and the same are, hereby approved and adopted for the guidance and instruction of the officers and men in the service of the Midland Railway Company, on and from August 1st, 1904."

The rules were prefaced by a statement that "Every servant supplied with this book must make himself thoroughly acquainted with, and will be held responsible for a knowledge of, and compliance with, the whole of the following rules and regulations."

Rule 1 was as follows: "All persons employed by the company must devote themselves exclusively to the company's service; they must reside at whatever places may be appointed, attend at such hours as may be required, pay prompt obedience to all persons placed in authority over them, and conform to all the rules and regulations of the company."

Rule 11. "No servant of the company is allowed to trade, either directly or indirectly, for himself or others."

Rule 243. "Each inspector must have a register of the names and places of residence of all the men employed in his district, so that in case of accident he may be enabled to summon them immediately to assist in any way that may be required. Should any obstruction take place, caused by snow, frost, slips, or other sudden emergency, he must immediately collect the number of men required."

There were 281 rules besides working regulations.

Rule 1 was not mentioned at the hearing in the county court, and no evidence was adduced with reference to the knowledge or ignorance of the company of the applicant's employment at the theatre.

The learned judge decided in favour of the applicant and awarded him 14*s.* a week till June 6, when he became able to do light work, and 10*s.* 6*d.* a week thereafter whilst his incapacity to do the work of the railway continued. The railway company appealed.

J. D. Crawford, for the appellant company. The applicant's wages at the theatre ought not to be taken into consideration in computing his average weekly earnings. His employment at the theatre was not a "concurrent contract of service" within paragraph 2 (*b*) of Sched. I. to the Workmen's Compensation Act, 1906 (1), which he was justified in undertaking. The terms of his engagement with the railway company are comprised in the rules and regulations of that company. By rule 1 he had to devote himself exclusively to the company's service, that is to say, the company were entitled to the whole of his time. This is proved by rule 243, under which he might be summoned at any time to give assistance in case of accident. By rule 11 he was not allowed to trade. Therefore he had no right to enter into any contract with the theatre; he could not, by doing so, impose

---

(1) Sched. I., par. 2: "For the purposes of the provisions of this schedule relating to 'earnings' and 'average weekly earnings' of a workman, the following rules shall be observed . . . .

"(*b*) Where the workman had entered into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer, his average weekly earnings shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident;"

C. A.
1914

LLOYD
v.
MIDLAND
RAILWAY.

upon the railway company an additional burden of which they knew nothing, and against which they could not insure. This was not a "concurrent contract of service" within Sched. I. (2.) (*b*). The motive of the restrictions in the rules is that workmen employed on railway work must keep themselves fit to do it, and workmen must observe the stipulations they have agreed to: *Brandy* v. *Owners of S.S. Raphael.* (1) This question depends upon what was in the contemplation of the parties: *Godden* v. *W. Cowlin & Son* (2); *Penn* v. *Spiers & Pond.* (3) Further it is submitted that for contracts of service to be concurrent they must be ejusdem generis. The method of compensation is shewn by *Turner* v. *Port of London Authority.* (4)

Rigby Swift, K.C., and *F. E. Bodel*, for the applicant. The real point in this case is the effect of rule 1, which was not referred to at the hearing in the county court. But these rules are not the contract of service between the applicant and the railway company. They relate to all sorts of circumstances and classes of service and are issued only for "guidance and instruction." They do not form part of the contract; breaches of them would not give a cause of action. The only penalty for disobedience is dismissal. This was a concurrent service with the theatre and it is not admitted that the railway company did not know of it. But their knowledge is immaterial; if the workman has entered into concurrent contracts and worked for both employers his weekly earnings are the sum total of his earnings from both employers. There is nothing to make it obligatory on him to disclose the concurrent contracts, and great hardship to employers may result from that state of things. The company had no right to make the applicant give up the theatre. If the rules and regulations do apply, rule 1 only applies to the time during which the applicant is actually working for the railway company.

J. D. Crawford in reply.

SIR SAMUEL EVANS, PRESIDENT. At the request of the Master of the Rolls I will proceed to give judgment in this case.

---

(1) [1911] 1 K. B. 376, 381; [1911] A. C. 413, 414.

(2) [1913] 1 K. B. 590.

(3) [1908] 1 K. B. 766.

(4) (1913) 29 Times L. R. 204.

This is an appeal from the decision of the learned county court judge, who decided that he was entitled and bound in accordance with the Act of Parliament to take into account the earnings of the applicant in his concurrent service in estimating his "average weekly earnings" at the time when he was injured. The injured man was employed by the Midland Railway Company in the month of January, 1913, and the accident took place a few months afterwards. At the time when he entered the employment of the railway company he was already engaged in another service. It is admitted by Mr. Crawford that the work he was doing at that other place was done under a contract of service within the meaning of the words in Sched. I., paragraph 2 (*b*), to the Act of Parliament.

The case in the Court below was fought, as it has been in part fought here, on rule 11 and rule 243 of the "Rules and Regulations for the guidance of the officers and men in" the railway company's service; but there has been an additional contention here, namely, that rule 1 ought to be regarded as the rule which mainly determined the rights of the parties. Now it is very hard upon the applicant that that rule 1, whether it be a part of the contract or a regulation or an instruction, was never called to the attention of the learned county court judge, and, as this Court intimated to Mr. Crawford almost from the very beginning, he must stand or fall by the construction of that rule. He cannot do better for his case than rely upon that rule. If that rule had been called to the attention of the learned county court judge, no doubt evidence would have been called, at any rate evidence might have been called, by the applicant to shew that the employment at the theatre was one which was perfectly well known to the railway company, and was, therefore, carried on with their knowledge, and possibly with their sanction; and, in such a case as that, there could not be any contention on the part of the railway company—such a contention certainly would not be upheld—that the earnings in the concurrent service of the theatre ought not to be taken into account. We should not have decided this case against the applicant (if we had taken a different view as to the other part of the case, with which I am going to deal), without sending it back so as to give

C. A.
1914

LLOYD
v.
MIDLAND
RAILWAY.

The President.

him the opportunity which the conduct of the case by the respondents did not give him at the former trial of giving such evidence.

The question really is whether rule 1 in this book, which contains the general rules and regulations of the railway company, numbering some hundreds, prevents the operation of the sub-paragraph of the First Schedule upon which this case turns. The wording of that clause is perfectly clear and there is no limitation in it with regard to the character of the employment or any other matter, and the words must be construed in their ordinary sense. The clause is sub-paragraph (*b*) of paragraph 2 of the First Schedule, and it reads as follows: "where the workman had entered into concurrent contracts of service with two or more employers under which he worked at one time for one such employer and at another time for another such employer, his average weekly earnings shall be computed as if his earnings under all such contracts were earnings in the employment of the employer for whom he was working at the time of the accident." That is perfectly plain language, easy to interpret, and I do not think this Court or any other Court has a right to interpolate into that clause any words that would limit the character of the employment, or any other words which would limit the compensation which it was intended that the injured workman should have. The policy of the Legislature was, within certain limits, that is to say up to a certain percentage, to give the workman compensation in respect of his earnings in all his contracts of service. Now it is found in this case that this man earned 21*s.* a week under the railway company, and equally regularly earned 7*s.* a week in his other employment. His earning capacity, therefore, taken in the aggregate was 28*s.* a week, and it is upon that basis that he must be compensated by applying the appropriate percentage in accordance with the Act of Parliament in the case of any accident.

Now it is said that rule 1 is a term of the contract between the parties. I doubt that very much. It is more like an instruction or regulation, and it is so called. I think, if I had to determine that point, I should come to the conclusion that it does not form a part of the contract. But, supposing it does for the purposes of this decision, then what does it mean? Reading it fairly, I think it means this, that all persons employed by the company must, while they are in the company's service, while they are doing the company's work, in the working hours devote themselves exclusively to the company's service. They must not, in those hours, be doing any other work. They cannot go about, for instance, seeking people to join an insurance company for whom they might be agents. They cannot do anything of that kind. They must give the whole of their attention and the whole of their service to the railway company, but that is only during the time that the railway company have a right to call upon them for their services. I do not see that in this case, any more than in any other, unless there is an express contract to this effect, the railway company have a right to interfere with this man at all in the hours when he is not actually doing their work. It is quite true that, according to some of the rules, he was expected, if there was a case of emergency, to be ready at the call of the railway company to come to render such assistance as he might. That does not mean that he is to hold himself during the whole of his leisure time in such place and in such a condition so that the railway company could, at any moment, summon him to the place where an accident might have taken place as if he must wait expecting an emergency. I may add that evidence was given upon which we might act if necessary, that he might leave the theatre at any time if there was an emergency upon the railway, in order to give obedience to the rule or regulation or instruction to that effect.

On the broad grounds that this man was acting as a servant under a concurrent contract of service at the theatre; that he was, under that concurrent contract of service, earning 7*s.* a week regularly; that he was entitled to do so, notwithstanding anything contained in these rules, as long always as he did not neglect to do his work properly under the railway company; I think, in accordance with the ordinary reading of the English language, this sub-paragraph (*b*) means that the earnings in the concurrent contract of service must be added to those in the other service in order to ascertain, according to the proper

C. A.
1914

LLOYD
v.
MIDLAND
RAILWAY.

percentage, the compensation to which the applicant was entitled.

The appeal, therefore, will be dismissed with costs.

EVE J. I agree. Assuming, as I do without deciding the point, that these rules are to be read as part of the contract between the company and the workman, I do not think that the contract can accurately or properly be described as a contract for exclusive service. At most it amounts to this: an agreement by the workman that he will, during working hours, apply himself diligently and exclusively to the company's service. It is quite true, as Mr. Crawford has insisted, that under a subsequent clause in the contract his services can be requisitioned at other times than during ordinary working hours, but that does not or would not, in my opinion, warrant us in placing a wider construction upon rule 1 than that which I have indicated. Upon that ground, therefore, I come to the conclusion that the judgment appealed against is right.

I only want to add, in deference to the argument which Mr. Crawford has presented to us upon another point, that, in my opinion, there is no foundation for the suggestion that the concurrent contracts must be of an ejusdem generis character. The Act says nothing to that effect; and I venture to point out that the difficulties attendant upon the construction of this Act are numerous enough without their being increased by imposing upon this Court the obligation of deciding judicially how far one contract of service may or may not be ejusdem generis with another contract. I think there is nothing in that argument; and, on all the grounds advanced by Mr. Crawford, I think the appeal fails and must be dismissed.

COZENS-HARDY M.R. I agree. It will be dismissed with costs.

Appeal dismissed.

Solicitors: *Beale & Co.; W. P. Ellen, for R. Mills Roberts, Liverpool.*

H. C. R.

CODLING *v.* JOHN MOWLEM AND COMPANY, LIMITED.

[1913 C. 733.]

1913
June 17, 18, 25.

Employer and Workman—Workmen's Compensation—Death of Workman—Claim by Children—Payment of Compensation—Action by Widow for Negligence—Option—Election—Fatal Accidents Act, 1846 (9 *&* 10 *Vict.* c. 93)—*Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 2 (*b*).

Sect. 1, sub-s. 1, of the Workmen's Compensation Act, 1906, enacts that if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as therein mentioned, be liable to pay compensation. Sub-s. 2 provides that when the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in the Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under the Act or take proceedings independently of the Act; but that the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under the Act, and shall not be liable to any proceedings independently of the Act, except in case of such personal negligence or wilful act as aforesaid.

By s. 13 any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants including members of his family wholly or in part dependent on his earnings:—

Held, that the effect of these enactments is: (1.) That where a workman has been injured by accident in circumstances which would give him, or, in the event of his death, his dependants, a claim for compensation under the Act and also for damages for negligence independently of the Act, the workman, or his dependants as the case may be, can pursue either remedy but not both remedies. The claimant has an option as to which he will choose, and, having elected either alternative, is bound by his election.

(2.) That the employer is not to be liable to pay compensation for injury to a workman or his dependants both independently of and also under the Act.

The plaintiff, who was the widow of a workman killed by accident arising out of and in the course of his employment, brought an action under the Fatal Accidents Act, 1846, against the defendants, who had been his employers, charging them with negligence causing her husband's death. The statement of claim alleged that the deceased workman left as dependants the plaintiff and six children; that all the dependants except the plaintiff had claimed under the Workmen's

1913

CODLING
v.
JOHN
MOWLEM
AND
COMPANY,
LIMITED.

Compensation Act, 1906, against the defendants, and that an award had been made apportioning the total sum of 300*l.* equally between the children. The defendants by their defence, after denying the alleged negligence, pleaded that the plaintiff had made a claim on them on behalf of herself and her children for compensation under the Act of 1906; that the defendants admitting liability under that Act had paid into the county court the maximum amount payable under the Act, namely, 300*l.*; that the children by their next friend had applied to the county court for an order for the investment and allotment of the sum of 300*l.* between the dependants, and that the county court judge had allotted 50*l.* to each of the children and directed that 45*l.* out of each sum of 50*l.* should be invested, and that out of the residue the sum of 18 shillings a week together with the interest on the invested money should be paid to the plaintiff for the benefit of the children; that the plaintiff knew the facts and concurred in the application and attended the hearing and thereat renounced her rights and interest in the sum of 300*l.*, and that the award and allotment were made with her consent. It appeared that in the application for allotment the children by their next friend named the plaintiff as a dependant, but applied for a division among the children only and expressly stated that the plaintiff did not claim under the Act of 1906.

An order having been made in chambers for the decision of the point of law raised on the pleadings, the Court declined to hold as a matter of law that the plaintiff had elected to pursue her remedy under the Act of 1906, the question of election being principally one of fact; but

Held, that the defendants having paid compensation under the Act of 1906 were not liable to pay damages under the Act of 1846.

POINT OF LAW arising on the pleadings.

The writ was issued on March 8, 1912. The statement of claim was delivered as amended on June 21, 1912. The plaintiff claimed damages against the defendants under the Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93), alleging that in consequence of the defendants' negligence the plaintiff's husband, William Codling, was killed on December 21, 1911.

Paragraph 5 of the amended statement of claim was as follows: "At the time of his death the deceased left as dependants wholly dependent upon his earnings the plaintiff and six infant children but all the said dependants except the plaintiff have claimed under the Workmen's Compensation Act, 1906, against the defendants and an award apportioning a total sum of 300*l.* equally between the said six infant children was made in the City of London Court on February 29, 1912. This action is

1913

CODLING v. JOHN MOWLEM AND COMPANY, LIMITED.

brought by the plaintiff for her own benefit as the widow of the deceased. The nature of the claim in respect of which damages are sought is that the said William Codling was a miner and was earning on an average 3*l.* 15*s.* a week and was the sole support of his said wife who has sustained pecuniary loss from his death."

The defendants by their defence delivered on July 8, 1912, after traversing the plaintiff's allegations as to negligence and setting up a defence based on the doctrine of common employment, proceeded to allege as follows:

"5. Alternatively they say that by letters written by the plaintiff's solicitor and dated respectively December 29, 1911, and February 14, 1912, the plaintiff made a claim upon the defendants on behalf of herself and her children for compensation in respect of the death of the said William Codling, and the defendants having by letter dated January 5, 1912, admitted liability under the Workmen's Compensation Act, 1906, they on February 21, 1912, paid into the City of London Court, which in the circumstances was the proper Court having jurisdiction under the said Act, and the registrar of such Court duly accepted, the sum of 300*l.* which is the maximum amount payable under the said Act. By notice in writing dated February 21, 1912, and by letter of even date they duly notified to the said registrar that the plaintiff and the said six children of the said William Codling deceased were interested in the said sum of 300*l.*

"6. By notice in writing dated February 27, 1912, one Charles Codling acting as next friend to the said children of the said William Codling deceased applied to the learned judge of the said Court for an order for the investment and allotment of the said sum of 300*l.* between the dependants of the said William Codling deceased, and pursuant thereto Sir John Paget, Baronet, K.C., the deputy judge of the said Court, by his award dated February 29, 1912, allotted the sum of 50*l.* to each of the plaintiff's said children and directed that 45*l.* out of each sum of 50*l.* should be invested and that out of the residue the sum of 18 shillings per week should be paid to the plaintiff and also that the interest of the said invested moneys should be paid to the plaintiff to be applied by her for the benefit of the said children.

1913

CODLING v. JOHN MOWLEM AND COMPANY, LIMITED.

"7. The plaintiff was throughout cognizant of the facts and documents mentioned in the two last preceding paragraphs and she approved of and concurred in the said application of the said Charles Codling and attended the hearing of the same and thereat renounced her rights and interest in the said sum of 300*l.* in favour of her said children and the said award of the said deputy judge was made with her consent.

"8. The defendants will therefore contend that this action is barred and is not maintainable by reason of the provisions of s. 1 sub-s. 2 (*b*), of the Workmen's Compensation Act, 1906, (6 Edw. 7, c. 58)." (1)

In this state of the pleadings a Master in chambers made an order in the following terms:—"It is ordered that the point of law as raised by the above-named plaintiff in paragraph No. 5 of her amended statement of claim and by the above named defendants in paragraphs numbered 5, 6, and 7 of their defence—viz. whether by reason of the premises this action is barred, and is not maintainable by reason of the provisions of s. 1, sub-s. 2 (*b*), of the Workmen's Compensation Act, 1906,

---

(1) Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), s. 1: "(1.) If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act.

"(2.) Provided that . . . . (*b*) When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid."

Sect. 13: "In this Act, unless the context otherwise requires,— . . . .

"Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable;

"'Dependants' means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death . . . ."

1913

CODLING v. JOHN MOWLEM AND COMPANY, LIMITED.

(6 Edw. 7, c. 58), may be set down for argument before a judge in Court."

David, K.C., and *Fenton*, for the plaintiff.
Ellis Hill, for the defendants.

June 25. ATKIN J. delivered a written judgment which after stating the above facts continued as follows:—

The allegations of the defendants include material allegations of fact, notably paragraph 7 of the defence, which I was told by counsel for the plaintiff are seriously disputed on her behalf. Under these circumstances it does not appear to me convenient to determine a preliminary point upon the footing of the truth of facts which may hereafter prove to be non-existent. I am bound however, under the order for the purpose of this decision to assume the facts to be as stated in the pleadings.

The question raised by the pleadings is as to the application to the facts stated of the provisions of the Workmen's Compensation Act, 1906, s. 1, sub-s. 2 (*b*), which run as follows: [The learned judge read s. 1 of the Act and continued:] For the complete effect of this section it is necessary to refer to s. 13 of the Act, the definition clause, where under the word "workman" it is provided that "Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable."

Two points seem to arise upon the sub-section:

(1.) That where a workman has been injured by accident under circumstances which would give him a claim under the Act and also for damages for negligence independently of the Act, he can pursue either remedy but not both. He has an option as to which he will choose, and, having elected either alternative, he is bound by his election;

(2.) That the employer is not to be liable to pay compensation for injury to a workman both independently of and also under this Act. I regard this as a protection given to the employer additional to the right he has of holding the workman to his election. It may emphasize and confirm the provision confining the workman to one only of the alternative remedies, but it also gives a right, independent of the exercise by any one of an option, i.e., a right not to pay twice over. It only applies to a liability to pay compensation for injury to a workman arising out of and in the course of his employment; and apparently in terms applies only in a case where the person seeking to enforce the liability would have had a right to compensation under the Act. It is said by the defendants that the plaintiff's claim is barred under both these heads: (*a*) that she has finally elected to claim compensation under the Act; (*b*) that the employers have already paid the full amount of compensation under the Act and are therefore not liable to pay compensation independently of the Act.

As to the first point it appears to me that the question of election is principally one of fact. "In general, the question of election can only be properly dealt with as a question of fact for the jury, subject to the direction of the presiding judge, as was done in the case of *Calder* v. *Dobell* (1); but there may no doubt be cases in which the act of the contractee in regard to his dealings with or proceeding against the agent, with full knowledge of the facts and freedom of choice, may be such as to preclude him in point of law from afterwards resorting to the principal": per Quain J. in giving the judgment of the Court of Queen's Bench in *Curtis* v. *Williamson*. (2) "The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election": *Scarf* v. *Jardine*, per Lord Blackburn. (1) Moreover, there cannot be an election without knowledge of the right to elect: *Kendall* v. *Hamilton*, per Lord Blackburn. (2)

---

(1) (1871) L. R. 6 C. P. 486.

(2) (1874) L. R. 10 Q. B. 57, at p. 59.

Upon this section it has been held that a workman had conclusively made his election when he brought an action under the Employers' Liability Act, 1880, and failed: *Edwards* v. *Godfrey* (3); where he had commenced an action for negligence and failed, and at the trial obtained a certificate for compensation under s. 1, sub-s. 4, of the Workmen's Compensation Act, 1897, in which case the election was held to preclude him from appealing in the action: *Neale* v. *Electric and Ordnance Accessories Co.* (4); and where he had brought an action at common law for negligence, and failed: *Cribb* v. *Kynoch* (No. 2). (5) On the other hand he has been held not to have made his election where he brought an action under the Employers' Liability Act, 1880, and failed, and then applied for a certificate for compensation under s. 1, sub-s. 4, which was refused: *Isaacson* v. *New Grand* (*Clapham Junction*) (6) (*quære* whether this is consistent with *Neale* v. *Electric and Ordnance Accessories Co.* (4)); and where he instituted proceedings under the Workmen's Compensation Act, 1897, and, on discovery from the employer's answer that his case was not within the Act, abandoned the proceedings: *Rouse* v. *Dixon*. (7) There are other Irish and Scotch decisions which, as they are not in my view all consistent with the English authorities I have quoted, and are not binding upon me, I forbear to cite. I think they all intend to apply the principles laid down in the extracts I quoted from the judgments of Quain J. and Lord Blackburn.

Now in this case do the facts set out in the pleadings and the documents referred to therein establish such an unequivocal act by the plaintiff as compels me to hold as a matter of law that the plaintiff has elected to take her remedy under the Workmen's Compensation Act, 1906? The relevant facts, as I must assume them to be, are that she was totally dependent on the deceased; that by the letter of December 29 her solicitor wrote on her behalf making a claim for damages for negligence; that by the letter of February 14 the same solicitor wrote on behalf of the six children, also dependants, making a claim under the Workmen's Compensation Act, 1906, and requesting a payment into Court; that on February 21, 1913, the defendants paid into Court the full sum for which they could be liable under the Act, namely, 300*l.*, naming the plaintiff as one of the dependants; that on the same day by notice of that date the registrar of the county court issued the proper notice of such payment into Court addressed to the plaintiff and others notifying that any person interested could apply to the Court for an order for the application of the said sum in accordance with Sched. I., paragraph 5; that on February 27 the next friend of the six children only applied for an order naming the plaintiff as a dependant, but expressly stating that the plaintiff "has not claimed and does not claim under the Workmen's Compensation Act, 1906," applying for the division of the fund among the six children only, and addressing the application to the widow; and that on February 29 an award was made by the county court judge granting the application of the next friend, in which the plaintiff was not named as a party but which provided for payments to be made to the plaintiff for the benefit of the children. Further I am to assume that the widow was cognizant and approved of all the above proceedings, appeared at the hearing and thereat renounced her rights and interest in the said sum of 300*l.* in favour of her said children, and that the said award was made with her consent. The widow was not a formal party to the award and the application on which it is founded expressly states that she makes no claim under the Act. On the other hand the statement that she consented to the proceedings and "renounced her claim" together with the other facts is said to be conclusive. I am only to decide a question of law, and it appears to me that the circumstances here disclosed raise a question of fact proper to be determined by a tribunal of fact. I do not think that on the

---

(1) (1882) 7 App. Cas. 345, at pp. 360, 361.

(2) (1879) 4 App. Cas. 504, at p. 542.

(3) [1899] 2 Q. B. 333.

(4) [1906] 2 K. B. 558.

(5) [1908] 2 K. B. 551.

(6) [1903] 1 K. B. 539.

(7) [1904] 2 K. B. 628.

1913

CODLING v. JOHN MOWLEM AND COMPANY, LIMITED.

Atkin J.

assumed facts the necessary legal inference is that there was a final election and I decline to draw such an inference. In view of the terms of the solicitor's letter of December 29 I have not referred to the question of knowledge by the widow of her right to bring an action; though there is no express allegation in the pleadings of knowledge and I should have thought such an averment material.

I have dealt fully with the facts upon the first point in case I should be wrong in holding that the proviso that the employer is not to be liable twice over affords a separate protection to the employer in addition to the right to have the workman bound by his election. But being of opinion, as I am, that it does afford a separate defence, I think that on this second point the employers are entitled to succeed. The employers have been made liable to pay and have in fact paid compensation for injury to a workman by accident arising out of and in the course of his employment under the Workmen's Compensation Act, 1906, by an award duly made. It seems to me immaterial whether such liability was imposed and payment made with the knowledge and consent of the plaintiff or not; but in this case the plaintiff both knew and consented. I think that the employers are by the terms of the Act not liable also to pay compensation for such injury independently of the Act; and the plaintiff in this action seeks to impose such a liability. I therefore decide the point of law mentioned in the order in favour of the defendants, who must have the costs of the hearing before me in any event. I have not under the circumstances had to determine what the legal position is when some dependants seek to pursue one remedy and some another before any liability of the employer is established. It appears to me a condition of things which might well arise, and, as far as I know, there are no provisions in the Act or Rules providing for it. The question in my view does not arise here, and I express no opinion about it.

Judgment for defendants.

Solicitor for plaintiff: *J. Scott Duckers.*

Solicitors for defendants: *Mackrell, Maton, Godlee & Quincey.*

W. H. G.

1913
Dec. 10.

In re GODDING.
Ex parte THE TRUSTEE.

Bankruptcy—Judgment Debtor—Execution levied—Payment out direct to Judgment Creditor—Withdrawal of Sheriff—"Completion of execution"—Bankruptcy Act, 1883 (46 & 47 *Vict.* c. 52), s. 45—*Bankruptcy Act,* 1890 (53 & 54 *Vict.* c. 71), s. 11.

For the purposes of s. 45 of the Bankruptcy Act, 1883, and s. 11 of the Bankruptcy Act, 1890, an execution levied on the goods of a judgment debtor is not completed except by seizure and sale or payment of the full amount of the levy to the sheriff, and the retention by the sheriff of the moneys received for fourteen days without notice of a bankruptcy petition against the debtor.

Where therefore the goods of a debtor were seized in execution and, to avoid a sale, he paid the full amount of the levy directly to the execution creditor and also paid the charges of the sheriff, who withdrew by direction of the execution creditor, and nine days afterwards the debtor became bankrupt:—

Held, that the execution had not been completed and that the creditor could not, as against the trustee in bankruptcy, retain the money which had been paid to him.

In re Pollock (1902) 87 L. T. 238, and *In re Jenkins* (1904) 90 L. T. 65; 20 Times L. R. 187, discussed.

This was an application that raised the question whether a judgment creditor was entitled to the benefit of the execution he had levied on the goods of the debtor under these circumstances.

Prior to his bankruptcy the debtor carried on the business of a nurseryman in his own name at Hanworth in Middlesex, and the business of a costumier under the name and style of Madame Brenda at No. 44, Upper Baker Street, London. T. Lloyd & Co. were trade creditors of Madame Brenda, whose account with them was guaranteed by the debtor in his own name, they not knowing that it was the debtor's business.

On April 24, 1913, T. Lloyd & Co. issued a writ against Madame Brenda for 27*l.* 17*s.* 10*d.* for goods supplied, and on the same day they issued a writ against the debtor in his own name, as guarantor, for the same amount. On May 5 they signed judgment against Madame Brenda for the 27*l.* 17*s.* 10*d.* and 4*l.* costs, and on May 15 they signed judgment for the like amount against

1913

GODDING, *In re.*
THE TRUSTEE, *Ex parte.*

the debtor in his own name, as guarantor. On May 21 the sheriff levied execution on the goods of the debtor at his private residence under a writ of fi. fa. issued by T. Lloyd & Co. for their judgment debt and costs; and on May 23 T. Lloyd & Co. served a garnishee order nisi in respect of the same judgment debt and costs on the Baker Street branch of the National Provincial Bank of England, the bankers of Madame Brenda, where a sum of about 13*l.* was then standing to the credit of Madame Brenda's account. The same day T. Lloyd & Co., on an intimation from Messrs. Withers & Co. (the solicitors of the debtor) that the execution would probably be paid out in a day or two, instructed the sheriff not to remove the goods of the debtor from his private residence. On May 28 Messrs. Withers & Co., out of moneys given them by the debtor, paid T. Lloyd & Co. 36*l.* 16*s.* 10*d.* made up as follows:

	£	*s.*	*d.*
Judgment debt	27	17	10
Costs of judgment	4	0	0
Solicitors' costs of execution . . .	1	10	0
Costs of garnishee proceedings . . .	3	3	0
Extra costs of judgment (there being separate judgments against the debtor and Madame Brenda)	0	6	0
	£36	16	10

Messrs. Withers & Co. also paid the sheriff 5*l.* 17*s.*, being the amount of his costs and possession fees, and he withdrew on instructions from T. Lloyd & Co.; and on June 3 the garnishee order nisi was discharged.

On June 5 the debtor presented his own petition in bankruptcy and submitted to a receiving order and immediate adjudication, and the official receiver at once gave notice of the bankruptcy to the sheriff. In July T. Lloyd & Co. ascertained for the first time that the business of Madame Brenda was the debtor's business. The trustee in bankruptcy now claimed payment of the 36*l.* 16*s.* 10*d.* from T. Lloyd & Co. as part of the property of the bankrupt on the ground that they could not, by accepting payment from the debtor under the said execution without allowing the same to come to the hands of the sheriff, evade the provisions of s. 11 of the Bankruptcy Act, 1890.

G. C. Rankin, for the trustee.

[HORRIDGE J. I do not see how the trustee can claim the 30*s.* for solicitors' costs, the 3*l.* 3*s.* the costs of the garnishee proceedings, and the 6*s.* extra costs, as part of the levy.]

The trustee will limit his claim to the amount of the judgment debt and costs—31*l.* 17*s.* 10*d.* The question depends on s. 45 of the Bankruptcy Act, 1883, and s. 11 of the Bankruptcy Act, 1890. It is submitted that for the purposes of the bankruptcy law an execution levied on the goods of a debtor is not completed except by seizure and sale or payment of the full amount of the levy to the sheriff, and the retention by the sheriff of the moneys received for fourteen days without notice of a bankruptcy petition: *Figg* v. *Moore Brothers* (1); *Burns-Burns* v. *Brown* (2); *In re Ford* (3); and the execution creditor cannot evade the statutory provisions by taking payment directly to himself: *In re Pollock.* (4) The case of *In re Jenkins* (5) may be cited by the opposite side, but there the payment to the creditor seems to have been treated as the same as payment to the sheriff, and more than fourteen days elapsed before the bankruptcy of the debtor.

Tindale Davis, for the execution creditor. Neither s. 45 nor s. 11 applies in this case. Sect. 45 does not apply because there has been no seizure and sale, and s. 11 does not apply because the amount of the levy was not paid to the sheriff. The sections do not deal with the case where money is paid directly to the execution creditor. Here the full amount of the levy was paid directly to the creditor and the execution was completed without notice of an act of bankruptcy. The observations of Wright and Channell JJ. in *In re Ford* (3) support this view. The execution creditor relies on *In re Jenkins* (5), in which case, as reported in the Times Law Reports, the soundness of the decision in *In re Pollock* (4) is questioned. The test is whether the execution has been completed against the goods of the debtor. In *In re Ford* (3) there was only a partial payment and the execution was incomplete. Here the full amount of the levy was paid and the whole of the debtor's goods were released by the payment, and the execution was completely got rid of by May 28. Further, the money was paid to get rid of the attachment as well as of the levy, and at the date of the service of the garnishee order nisi there was 13*l.* at the bank which was attachable. It is submitted therefore that at any rate the execution creditor is entitled to retain 13*l.* of the amount he received.

---

(1) [1894] 2 Q. B. 690.

(2) [1895] 1 Q. B. 324.

(3) [1900] 1 Q. B. 264.

(4) 87 L. T. 238.

(5) 90 L. T. 65; 20 Times L. R. 187.

G. C. Rankin in reply. In *In re Jenkins* (1) more than fourteen days elapsed after the payment before the debtor became bankrupt, and the Court seem to have applied the analogy of the statutory fourteen days. It is submitted that, if in that case the debtor had become bankrupt within fourteen days after the payment, the Court would have followed *In re Pollock.* (2)

Horridge J. The question in this case has been rendered very difficult owing to the reported cases, which I find rather hard to reconcile. The facts of the case are these. [The learned judge stated the facts and continued:] Under these circumstances the trustee of the bankrupt says that he is entitled under s. 45 of the Bankruptcy Act, 1883, and s. 11, sub-ss. 1 and 2, of the Bankruptcy Act, 1890, to an order upon the respondents, the judgment creditors, to pay to him the sum of 31*l.* 17*s.* 10*d.* Now on the threshold of the inquiry as to whether or not he is entitled to that order I must decide whether, within s. 45, that amount represents the benefit of the execution. It is quite true that it was paid to get rid both of the execution and of the garnishee order nisi, and it is admitted that at the time, namely, May 28, there was standing to the credit of the debtor at the National Provincial Bank a sum of 13*l.* which would have been attachable under the order nisi. In my view, however, the true inference is that the money was paid to get rid of the execution, although it might also be paid to get rid of the garnishee order nisi, and that it did represent the benefit of the execution. Then is the trustee entitled to payment of that sum? I will deal first with s. 45 of the Act of 1883. [The learned judge read the section and continued :] That section, if one really looks at what it says, does not seem to be difficult, because it says the creditor shall not be entitled to retain the benefit of the execution unless the execution is completed, and sub-s. 2 says: "For the purposes of this Act, an execution against goods is completed by seizure and sale." A further completion is added, to which I will refer later, by the provisions of s. 11 of the Bankruptcy Act of 1890. Reading s. 45 for myself, if I were reading it without the light of authority, I should say it was quite clear that for the purposes of the section "completion" must mean either seizure and sale, or else the facts must bring what took place within the provisions of s. 11 of the Bankruptcy Act, 1890. Now Vaughan Williams L.J., when Vaughan Williams J., had to consider what was completion of an execution in the case of *Figg* v. *Moore Brothers* (1), and, dealing with s. 45 of the Bankruptcy Act of 1883, he says this: "That section provides (sub-s. 1) that where a creditor has levied execution against the goods of a debtor, he shall not be entitled to retain the benefit of the execution against the trustee in bankruptcy of the debtor, unless he has completed the execution before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor; and sub-s. 2 says, that for the purpose of the Act an execution against goods is completed by seizure and sale, or reading in s. 11 of the Bankruptcy Act, 1890, receipt or recovery of the full amount of the levy." I read that statement of the law by the learned judge to be comprehensive and as meaning that those are the only ways which for the purposes of that section are to be treated as "completion of the execution." The same question which arose in *Figg* v. *Moore Brothers* (1) also arose in the case of *Burns-Burns* v. *Brown* (2), and Lord Halsbury, in delivering judgment as a member of the Court of Appeal in that case, said: "I think it is expressly determined by s. 45 of the Bankruptcy Act, 1883, which provides that an execution creditor shall not be entitled to retain the benefit of his execution against the trustee in bankruptcy of the debtor unless he has completed the execution (that is, by seizure and sale) before the date of the receiving order, and before notice of the commission of any available act of bankruptcy by the debtor." Therefore Lord Halsbury gives the same definition to completion, apart from the provisions of the Act of 1890, that Vaughan Williams L.J. does, because for the purposes of that case it was not necessary to consider the provisions of s. 11 of the Act of 1890. Is there anything which forces me to hold that that is not the right construction of the section? In the case of *In re Ford* (1) there are dicta in the judgment of Channell J. which suggest that if the money was paid to the judgment creditor and the sheriff was withdrawn that would be a completion within the meaning of s. 45. The question there, however, did not turn upon whether or not such a state of circumstances did amount to a completion of the execution, but upon whether, where there had been no completion of the execution and express right to re-enter had been given, the execution was completed, and the decision of the Court was that it was not completed, and, therefore, that the money was repayable. I do not think that the language of Channell J., with all respect to that learned judge, binds me in face of the clear words of the section and the language used by Vaughan Williams L.J. and Lord Halsbury to which I have referred. The other case relied upon is more directly in point, and that is the case of *In re Jenkins.* (2) In that case moneys had been paid direct to the judgment creditor in addition to the moneys which were paid to the sheriff, and the sheriff had held in hand the moneys paid to him for the fourteen days required under s. 11 of the Act of 1890. It is quite true that in that case the execution would not have been completed so as to entitle the creditor to retain the money unless the payment of the money and withdrawal of the sheriff was a completion within s. 45. What the learned judges there appear to have relied upon was that the sheriff had kept the money for the fourteen days. As to the other items and the cash payment they treated them as covered by what the Court said in *In re Ford* (1). The actual decision in *In re Ford* (1) would not cover these items, although the

---

(1) 90 L. T. 65; 20 Times L. R. 187.

(2) 87 L. T. 238.

---

(1) [1894] 2 Q. B. 690.

(2) [1895] 1 Q. B. 324.

(1) [1900] 1 Q. B. 264, 268.

(2) 90 L. T. 65; 20 Times L. R. 187.

observations in that case which I have referred to might possibly do so. I do not think that those two authorities ought to lead me to ignore the language used by Vaughan Williams L.J. and Lord Halsbury, and my own very strong view, as to the meaning of the section. I therefore think that in this case there has been no completion of the execution because there has not been seizure and sale, nor have there been circumstances which bring the matter within s. 11 of the Act of 1890 (which I am going to deal with later), and that, therefore, the trustee under s. 45 is entitled to have the money back.

There remain to be considered the two sub-sections of s. 11 of the Act of 1890, and the decision in *In re Pollock.* (1) Speaking for myself, I do not think that these sub-sections have any application because they expressly deal with moneys paid to the sheriff, and in this case no moneys were paid to the sheriff. They both deal with the sheriff handing over money which has been seized or received in satisfaction of the execution, and with deducting from such moneys the costs of the execution, and I think both those sub-sections are dealing with money which has been actually received by the sheriff. *In re Pollock* (1) is an authority that if the money received by the creditor is to be treated as received by the sheriff the execution creditor cannot hold the proceeds if notice of a bankruptcy petition is given to the sheriff within fourteen days as it was in this case. If that authority is rightly decided it carries the applicant in this case, because here the money was received by the creditor and notice of the receiving order was given to the sheriff within the fourteen days required by s. 11, sub-s. 2. My opinion, therefore, is that s. 45 compels the creditor to refund to the trustee any moneys received under an execution which is not completed, and completion means either completed by seizure and sale, or by the full amount of the levy having been paid to the sheriff and held by him in pursuance of s. 11. In this case there has been no completion because neither of those events have happened. There has been no seizure and sale, and there has been no payment to the sheriff of the full amount of the levy within the meaning of s. 11 of the Act of 1890. The question is a difficult one, but, giving the best consideration I can to the authorities, I think the motion ought to succeed. There will be an order for payment of the 31*l.* 17*s.* 10*d.* to the trustee.

---

(1) 87 L. T. 238.

Solicitors: *Cameron, Kemm & Co.; Braby & Waller.*

H. L. F.

1914
Jan. 19, 26.

In re ALLIX.

Ex parte THE TRUSTEE.

Bankruptcy—Deed of Arrangement—Non-registration—Assignment for Benefit of Scheduled Creditors—Deeds of Arrangement Act, 1887 (50 & 51 *Vict. c.* 57), *s.* 4, *sub-s.* 2; *s.* 19.

In December, 1892, a debtor convened a meeting of eighteen of his principal creditors, and in pursuance of a resolution then passed a deed of arrangement was made between the debtor of the first part, two sureties of the second part, a trustee of the third part, and the several persons whose names and seals were thereunto subscribed and affixed being respectively creditors of the debtor and thereinafter called "the creditors" of the fourth part, whereby the debtor assigned to the trustee a life policy upon trust for the payment of the debts due to the creditors with interest and covenanted to stand possessed of all moneys that he should receive from certain sources upon trust for the creditors or their trustees, and the creditors in consideration of the premises covenanted not to sue the debtor during the life of his mother. This deed was not registered under the Deeds of Arrangement Act, 1887, but an affidavit made at the time under the Act by the debtor stated that his liabilities were 9388*l.* 16*s.* 8*d.* and were due to eighteen creditors whose names and addresses were set out in a schedule to the affidavit. There were, however, four other creditors, not mentioned in the affidavit, whose debts exceeded 5000*l.* and who were no parties to the transaction. Of the eighteen creditors, thirteen executed the deed, but five did not. In 1900 the debtor became bankrupt, and all the thirteen creditors scheduled to the deed, except three of them, proved in the bankruptcy. The trustee in bankruptcy realized a considerable sum, and the creditors under the deed who had not proved in the bankruptcy claimed that the fund was subject to the trusts of the deed:—

Held, that the deed was not confined to a limited class of creditors, but was for the benefit of creditors generally, and was void for non-registration.

1914

ALLIX, *In re.*

THE TRUSTEE, *Ex parte.*

The principle of *General Furnishing and Upholstering Co.* v. *Venn* (1863) 32 L. J. (Ex.) 220, applied.

In re Saumarez [1907] 2 K. B. 170, distinguished.

THIS was an application that raised the question of the validity of an unregistered deed of arrangement.

By a deed dated April 21, 1893, and made between Colonel Noel Allix, the debtor, of the first part, two persons as sureties for the debtor of the second part, one Chatteris, called the trustee, of the third part, and "the several persons whose names and seals are hereunto subscribed and affixed by themselves or their respective partners agents or attorneys being respectively creditors of the debtor (who are hereinafter called the creditors)" of the fourth part, after reciting (inter alia) that the debtor was indebted to the creditors in the several sums of money set opposite to their respective names in the schedule, which he was unable then to pay but which he expected to be able to pay after the death of his mother, and that it had been agreed by and between the parties thereto that a scheme of settlement should be adopted for the liquidation of the said debts in manner thereinafter appearing, it was witnessed that the debtor at the request of the creditors and for the consideration thereinafter appearing did thereby as beneficial owner assign to the trustee a life policy of 7000*l.* in the Pelican Office upon trust for the benefit of the creditors; and the debtor and his sureties covenanted to keep up the policy; and the debtor covenanted with the trustee to stand possessed, as and when the same should be received or receivable, of all moneys and other property to be derived by appointment, will, or intestacy from his mother or from his father in trust for the benefit of the creditors or their trustees, but not so as to create a forfeiture or by way of anticipation; and in consideration of the premises the creditors severally covenanted with the debtor not to sue him at any time during the life of his mother for or on account of any debts or sums of money which he then owed to them respectively.

The names of thirteen creditors, with the sums due to them respectively (which totalled 6892*l.* 10*s.* 7*d.*), appeared in a schedule to this deed, and all of them executed the deed.

The deed was never registered under the Deeds of Arrangement Act, 1887, although orders were obtained on May 17 and 30, 1893, by the debtor's solicitors extending the time for registration, and the debtor made an affidavit under s. 6 of the Act which stated his total indebtedness at that time to be 9388*l.* 16*s.* 8*d.* due to eighteen creditors whose names and debts were scheduled to the affidavit. Thirteen of these creditors executed the deed, but five of them whose debts amounted to 2496*l.* 6*s.* 1*d.* did not execute the deed.

On May 22, 1900, a receiving order was made against the debtor, and on August 11, 1900, he was adjudicated a bankrupt, and one Jeffreys was appointed the trustee in bankruptcy. All the thirteen creditors who executed the deed of arrangement, except three of them, proved their debts in the bankruptcy; and the policy was allowed to lapse. In September, 1902, Jeffreys was released from his trusteeship without having realized any assets, and the official receiver became the trustee.

In 1894 the debtor's father died possessed of real estate in Belgium. In 1910 the debtor's mother died, having by her will, made in exercise of a special power of appointment given to her by her father, appointed a sum of money to the debtor. From these sources the official receiver eventually received sums amounting to 5854*l.* 0*s.* 2*d.*, and after payment thereout of the costs, charges, fees, and percentages payable in the bankruptcy there remained in his hands a sum of 5342*l.* 10*s.* 2*d.*, and he now applied for directions as to how he was to dispose of that sum. Some of the creditors under the deed of arrangement who had not proved in the bankruptcy claimed that the whole of the 5342*l.* 10*s.* 2*d.* was subject to the trusts of that deed. Chatteris, the trustee under the deed, had died in 1903, but a new trustee had been appointed in his place.

It appeared that the circumstances under which the deed was made were these. On December 21, 1892, Messrs. G. S. & H. Brandon, the solicitors of the debtor, sent the following circular letter to eighteen creditors of the debtor :—" Dear Sir,—We shall be glad if you can make it convenient to attend a meeting of the principal creditors of Colonel Noel Allix to be held here to-morrow (Thursday) at 12 o'clock." For the purposes of this meeting Messrs. G. S. & H. Brandon prepared a list of the eighteen creditors : their debts amounted to about 10,000*l.* The meeting was held on December 22, 1892 (Mr. H. Brandon being in the chair), and the following resolution was passed:—" That a letter of license to Colonel Allix be executed by the creditors, the license to continue until the death of the mother of Colonel Allix, and that Colonel Allix covenant with the creditors that interest at the rate of ten per cent. per annum shall run on the amounts due to the creditors respectively, and Colonel Allix to insure his life against that of his mother to cover the amount of the indebtedness." Eight of the creditors present at the meeting signed this resolution and afterwards executed the deed of April 21, 1893, which was prepared in pursuance of it. A memorandum prepared by Messrs. G. S. & H. Brandon, dated May 15, 1893, was headed " Colonel Allix," and stated " List of creditors who have yet to sign the deed of arrangement." Then followed the names of seven of the eighteen creditors, but only two of them subsequently signed the deed, and thus made up the thirteen scheduled creditors. Meetings of the scheduled creditors were held from time to time. One of such meetings was convened by a circular letter sent out on August 30, 1900, by Messrs. G. S. & H. Brandon, which was as follows: " Colonel Noel Allix, a bankrupt. On behalf and at the request of our client Mr. Charles Chatteris, the trustee of the deed for the benefit of certain creditors dated the 21st of April, 1893, we beg to give you notice that a meeting of the signatories to the said deed (of which you are one) will be held at these offices on Friday the 7th prox. at 4 o'clock prompt to consider the position consequent on the recent bankruptcy of the debtor." The debtor's liabilities at the time of his bankruptcy exceeded 30,000*l*. On his public examination he stated that the deed of arrangement only settled with his then pressing creditors. It also appeared that at the date of the deed the debtor, in addition to the eighteen creditors mentioned in his affidavit, was indebted to four other creditors for upwards of 5000*l*. who proved in the bankruptcy. These four creditors were no parties to the transactions of December, 1892, nor to the deed.

F. Mellor, for the official receiver. The deed of arrangement is void for non-registration because on its true construction it is

1914

ALLIX, *In re.* THE TRUSTEE, *Ex parte.*

a deed for the benefit of creditors generally and comes within the principle of *General Furnishing and Upholstering Co.* v. *Venn* (1), *Boldero* v. *London and Westminster Loan and Discount Co.* (2), *Hedges* v. *Preston* (3), *Hadley & Son* v. *Beedom* (4), and *In re Rileys.* (5) The case of *In re Saumarez* (6) will be cited against us, but it is very different in its facts from the present case. There, the deed was for the benefit of certain specified creditors and no others. Here, the deed is not limited to the thirteen creditors who signed it. The creditors are described as "the several persons whose names and seals are hereunto subscribed," and the debtor's affidavit shews it was contemplated that eighteen creditors should execute the deed. Eight of them signed the resolution of December, 1892, and five of them came in afterwards, and there is nothing on the face of the deed to limit it to the thirteen creditors who signed it or to the eighteen creditors, or to exclude any other creditors who might claim to come in under it.

E. W. Hansell, for the present trustee of the deed and the creditors under it claiming the fund. The principle of *In re Saumarez* (6) governs this case. Except *Hedges* v. *Preston* (3) and *In re Rileys* (5), the cases cited are decisions under the Bills of Sale Act, 1854, or the statute 13 Eliz. c. 5, and are not in pari materia. The facts in *Hedges* v. *Preston* (3) differ from the present case, and the point decided in *In re Rileys* (5) is that a limited company is not within the purview of the Deeds of Arrangement Act, 1887. But if the principle of *General Furnishing and Upholstering Co.* v. *Venn* (1) applies to a deed made for the benefit of creditors generally, this is not such a deed. Admitting that the facts of this case differ from those in *In re Saumarez* (6), it is submitted that nevertheless the principle of that decision applies. Regard must be had to the intention of the parties when the deed was executed. In *General Furnishing and Upholstering Co.* v. *Venn* (1) there was no evidence that there were any other creditors than those mentioned in the deed, although the Court did say that other creditors could have come in. Here the deed was made for the benefit of the principal creditors, whether thirteen or eighteen in number, and no more. All the eighteen could have come in, but there were other creditors up to 5000*l.* who were designedly left out. The debtor only contemplated eighteen creditors who were to come in under the deed, and the omitted creditors were not intended to share in the benefit. This is borne out by the debtor's statement at his public examination and the memorandum and letters of Messrs. Brandon. Looking at all the circumstances the deed was confined to a particular class of creditors and comes within the principle of *In re Saumarez.* (1)

---

(1) 32 L. J. (Ex.) 220.
(2) (1879) 5 Ex. D. 47.
(3) (1899) 80 L. T. 847.
(4) [1895] 1 Q. B. 646, 651.
(5) [1903] 2 Ch. 590, 596.
(6) [1907] 2 K. B. 170.

F. Mellor in reply.

[Arguments were also addressed to the Court, on the assumption that the deed was valid, as to what property passed under the debtor's covenant respecting his after-acquired property (which was a very special form of covenant), which do not call for a report.]

HORRIDGE J. This is an application for directions by the trustee in bankruptcy of Colonel Allix under the following circumstances. On April 21, 1893, Allix signed an assignment of property for the benefit of certain persons,—I will not say at present whether this assignment was for the benefit of his creditors as a whole. In August, 1900, he became bankrupt. In September, 1910, his mother died, and on her death he acquired a certain sum of money by virtue of an appointment made by her under a power contained in the will of her father. The father of the bankrupt died in 1894. On his father's death he obtained by way of légitim (under Belgian law) a certain sum of money. The deed of 1893 contained a covenant by the debtor to stand possessed of his after-acquired property in trust for the creditors in these terms. [The learned judge read the covenant.] The first question raised is the objection that the deed is an assignment for the benefit of creditors generally and ought to have been registered under the Deeds of Arrangement Act, 1887, and, not having been registered, is void. This depends on whether the deed was for the benefit of creditors generally or only those set out in the schedule thereto, or those and certain others intended to be benefited. The facts seem to be these. On December 21, 1892, Messrs. Brandon, the debtor's solicitors, wrote a letter convening a meeting of the principal creditors which was held on the following day at which a resolution was passed. The resolution does not specify any particular creditors, but was signed by eight of the creditors present at the meeting. Then there is a document to which attention has been called dated May 15, 1893. It is headed "Colonel Allix. List of creditors who have yet to sign the deed of arrangement." Five of these seven did not sign the deed, but two of them did subsequently sign. At this time there were other creditors, four in number and with claims amounting to 5395*l.*, who never signed the deed or attended any meeting of creditors. On May 19, 1893, an affidavit was sworn by the debtor for the purpose of registering the deed under the Deeds of Arrangement Act. The names of eighteen creditors were in the schedule to the affidavit, but they did not include the four above mentioned. It is said by Mr. Hansell that on these facts the deed was intended for the benefit of pressing creditors only, and that the debtor's statement on his public examination that the deed was for pressing creditors, and Messrs. Brandon's letter of August, 1900, in which they speak of the deed being only for the benefit of certain creditors, should be regarded. But I do not think that a statement of the solicitors or of the debtors made subsequently to the deed should guide me in the matter. I do not think the form of the deed shews that it was in fact intended to exclude other creditors if they chose to come in. I think the particular creditors for whose benefit the deed was drawn up were no doubt the eighteen named in the schedule to the affidavit, but I also think that other creditors were not excluded if they chose to come in. I must look at the deed itself and draw from it the inference whether it was intended for the benefit of creditors generally or for a limited and special class of creditors only. There are two cases which clearly shew the difference between deeds of these two types. In *General*

---

(1) [1907] 2 K. B. 170.

1914

ALLIX, *In re.* THE TRUSTEE, *Ex parte.*

Horridge J.

Furnishing and Upholstering Co. v. *Venn* (1) the deed was for the benefit of creditors generally, while that in *In re Saumarez* (2) was of the other type. The judgment in *General Furnishing and Upholstering Co.* v. *Venn* (1) establishes that if you describe the creditors by words such as "whose names and seals are hereunto subscribed," those words, although they identify those in the schedule, do not limit the deed to those alone, but give a description under which any creditor is entitled to come in afterwards and sign it. It is true that in that particular case the question was one of registration under the Bills of Sale Act, 1854, but I think the case goes further and establishes the principle that where a deed is drawn in this form any creditor is entitled to come in if he chooses. Byrne J. in *In re Rileys* (3) certainly took that view. *In re Saumarez* (2) is the case of a deed which is on the face of it clearly limited to creditors of a particular class. I have been furnished with the deed itself in that case and it is clearly incapable of application to creditors generally. The conclusion I draw is that the deed in the present case was for the benefit of creditors generally, and not having been registered under the Act of 1887, it is void. Therefore the title of the official receiver is better than that of the trustee under the deed. The application asks for directions, and I direct the official receiver to retain the 5342*l.* 10*s.* 2*d.* to deal with as part of the property of the debtor divisible amongst his creditors generally, and the costs of all parties will come out of the fund.

Solicitors: *Tarry, Sherlock & King; Gilbert Robins.*

(1) 32 L. J. (Ex.) 220.

(2) [1907] 2 K. B. 170.

(3) [1903] 2 Ch. 590, 596.

H. L. F.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D.
1913
Jan. 27, 28
C. A.
Nov. 7.

UPJOHN *v.* WILLESDEN URBAN DISTRICT COUNCIL.

Local Government—Land adjoining Street—Insufficiency of Fence—Use of Land for Purposes causing Inconvenience or Annoyance to the Public—Jurisdiction of Justices—Willesden Urban District Council Act, 1903 (3 *Edw.* 7, *c. clxxxi.*), *s.* 32.

By s. 32 of the Willesden Urban District Council Act, 1903, it is provided that "If any land in the district . . . . adjoining any street is allowed to remain unfenced or the fences thereof are allowed to be or remain out of repair, and such land is in the opinion of the council owing to the absence or inadequate repair of any such fence a source of danger to passengers, or is used for any immoral or indecent purposes or for any purpose causing inconvenience or annoyance to the public" the council may require the owner of the land to put up a sufficient fence, and on his default may do the work themselves and recover the expenses from him summarily as a civil debt:—

Held by the Court of Appeal, reversing the decision of the Divisional Court, that it is for the justices before whom proceedings for the recovery of the expenses are taken, and not for the council, to determine whether the land " is used for any immoral or indecent purposes or for any purpose causing inconvenience or annoyance to the public."

Case stated by justices of Willesden.

A complaint was preferred by the Willesden Urban District Council against the appellant claiming that he was indebted to them in a sum of 5*l.* 11*s.* 6*d.* for the expenses incurred by them in fencing certain vacant land of the appellant at the corner of Station Road and Riffel Road. On January 29, 1912, a notice was served by the district council upon the appellant stating that owing to the absence of a proper fence the land in question was used for purposes causing inconvenience or annoyance to the public and requiring him forthwith to fence the land properly. The appellant having neglected to comply with the terms of the notice, the council themselves erected a fence round the land, and claimed to recover the expenses of the erection under s. 32 of the Willesden Urban District Council Act, 1903. At the hearing before the justices the council contended that it was for them to decide whether the land in question had been used for a purpose causing inconvenience or annoyance to the public, but at the same time they offered in the event of the justices being of a different opinion to call evidence upon the point. The justices held that it was a matter for the council and not for the justices to determine, and that it was unnecessary to call the evidence proposed. They held that the council were entitled to recover the money claimed.

1913. Jan. 27, 28. *W. de B. Herbert,* for the appellant. The words "in the opinion of the council" in s. 32 are intended to apply only to the question of the land being a source of danger to passengers. If they had been intended to apply also to the question of the land being used for purposes causing inconvenience or annoyance to the public the word "is" ought to have followed the words "in the opinion of the council" and not to have preceded them. The words "or is used" must mean that the question of user is one, not of opinion for the council, but of fact to be found by the tribunal of fact, the justices. A section in almost identical terms is to be found in the Public Health Act, 1907 (7 Edw. 7, c. 53), s. 31. But there the present difficulty does not arise, for the words "in the opinion of the council" have dropped out, the question of the premises being a source of danger to passengers being, like that of the purposes for which the premises are used, left to the justices to decide as a fact.

Cecil Walsh, for the respondents. It may be that on a strict grammatical construction of the section the appellant's contention is right. But convenience requires that the same tribunal which has to decide whether the absence of a sufficient fence is a source of danger to passengers should also decide whether by reason of it the land is used for purposes causing annoyance to the public. The words "in the opinion of the council" ought to be repeated and read in before the words "is used for any . . . . purpose."

Ridley J. The question which we have to decide in this case is whether it was for the justices or the council to decide whether the land in question had been used for any purpose causing inconvenience or annoyance to the public. In my opinion it is for the council. I do not deny that it is possible to confine the application of the words "in the opinion of the council" to the portion of the clause dealing with danger to passengers, and there is much to be said for that view, because though it clearly would be a matter of opinion whether the absence of a proper fence was a source of danger to passengers, it might be said that the question whether the land was used for improper purposes was rather one of fact than of opinion. But I think the better interpretation is to read the words "in the opinion of the council" into the latter clause. Both classes of consequences flow from the same cause, the absence of a sufficient fence, and if the one is to be left to the council to decide I do not see why the other should not also.

LUSH J. Though I do not differ from my Lord, I confess I have felt considerable difficulty about the matter. If it were necessary to give a strict grammatical construction to the section I should be inclined to think that the words "in the opinion of the council" ought to be confined to the first part of the section; and moreover it would not be unreasonable to suppose that the Legislature intended the council to determine whether the land was dangerous, that being obviously a matter of opinion. But when you come to the question of the land being used for immoral purposes, or purposes causing annoyance to the public, that is by no means a matter of opinion. It may be one upon which evidence would have to be called on one side or the other, and it would have to be proved as a fact whether the land was used for those purposes. But it seems difficult to suppose that the Legislature intended a different procedure to be followed according as the disrepair of the fence involved danger to passengers, or annoyance to the public by reason of the purposes for which the land was used. On the whole I come to the conclusion, though not without great hesitation, that it was intended to leave both matters equally to the council to decide.

Appeal dismissed.

J. F. C.

C. A.
1913

UPJOHN
v.
WILLESDEN
URBAN
COUNCIL.

The appellant appealed to the Court of Appeal.

Nov. 7. *W. de B. Herbert*, for the appellant.
Cecil Walsh, K.C., for the respondents.

Vaughan Williams L.J. We are all of opinion that the words in s. 32 of the Willesden Urban District Council Act, 1903, "or is used for any immoral or indecent purposes or for any purpose causing inconvenience or annoyance to the public," refer to matters of fact which must be proved by evidence. The respondents desired to call evidence before the justices upon the point, but they were not allowed to do so. They must have the opportunity of doing so, and the case must therefore be remitted to the justices.

Buckley and Kennedy L.JJ. agreed.

Appeal allowed.

Solicitors for appellant: *Morgan & Upjohn.*
Solicitor for respondents: *W. G. Greig.*

W. F. B.

PAPWORTH *v.* MAYOR, ALDERMEN, AND COUNCILLORS OF THE METROPOLITAN BOROUGH OF BATTERSEA.

1913
Dec. 17, 20.

[1912 P. 2125.]

Local Government — London — Sanitary Authority — Highway — Sewer— Defective Gully — Negligence — Nonfeasance — Misfeasance — Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 68, 69, 96—*Metropolis Management* (*Battersea and Westminster*) *Act,* 1887 (50 & 51 *Vict. c.* 17), *s.* 4—*London Government Act,* 1899 (62 & 63 *Vict. c.* 14), *s.* 4.

By s. 68 of the Metropolis Management Act, 1855, the sewers therein described situate in any parish mentioned in Sched. A to the Act, with the gullies, grates, works, and things thereunto appertaining, became vested in the vestry of such parish; and other sewers situate within any district mentioned in Sched. B to the Act, with all such works and things as aforesaid, became vested in the board of works for such district; and all sewers made and to be made within any such parish or district, except as therein mentioned, were vested in the vestry or board respectively.

By s. 69 the vestries and boards were to repair and maintain the sewers so vested in them, and to cause to be made, repaired, and maintained such sewers and works as might be necessary for effectually draining their parish or district.

By s. 96 every vestry and district board within their parish or district were to execute the office, to have the powers and duties, and to be subject to the liabilities of the surveyor of highways.

The Wandsworth district, including the parish of St. Mary, Battersea, was one of the districts mentioned in Sched. B. In the year 1883 the Wandsworth District Board of Works constructed a gully with a grid or grating in connection with a sewer in L. Road situate in the parish of St. Mary, Battersea, and vested in them as aforesaid. The gully was negligently executed and was allowed to remain in a defective condition.

By s. 4 of the Metropolis Management (Battersea and Westminster) Act, 1887, the parish of St. Mary, Battersea, ceased to form part of the Wandsworth district, and it was enacted that the Metropolis Management Act, 1855, should "be read and have effect as if the said parish . . . . had been named in Part II. of Schedule A of the said Act"; the vestry of the said parish became a body corporate by the name of the Vestry of the Parish of St. Mary, Battersea; the other parishes named in Sched. B to the Act of 1855 as forming the Wandsworth district were to form the Wandsworth district for the purposes of the Act; and the Wandsworth District Board of Works continued to be a body corporate.

By s. 4 of the London Government Act, 1899, the vestry of the parish

1913

PAPWORTH
v.
BATTERSEA
CORPORATION.

of St. Mary, Battersea, ceased to exist, and the powers, duties, property, and liabilities of the vestry were transferred to the defendants as successors thereto.

The plaintiff while riding along L. Road was, owing to the defective condition of the gully, thrown from her bicycle and injured. She brought an action against the defendants for damages for the injuries sustained:—

Held, that the effect of s. 4 of the Metropolis Management (Battersea and Westminster) Act, 1887, was not to transfer to the vestry of the parish of St. Mary, Battersea, any existing liability of the Wandsworth District Board of Works in respect of the defective gully; and consequently that no such liability was transferred to the defendants by s. 4 of the London Government Act, 1899.

But *held* that, although not liable as the highway authority, the defendants were liable as the sewer authority for not remedying the defect in the gully.

Cowley v. *Newmarket Local Board* [1892] A. C. 345; *White* v. *Hindley Local Board* (1875) L. R. 10 Q. B. 219; and *Blackmore* v. *Vestry of Mile End Old Town* (1882) 9 Q. B. D. 451, followed.

FURTHER CONSIDERATION before Horridge J. after trial of the action before the learned judge and a common jury.

The plaintiff claimed damages for personal injuries caused, as she alleged, by the negligence of the defendants as the owners of a certain grid or grating placed in a public highway known as Lombard Road, within the borough of Battersea, above a sewer running under that road and also vested in the defendants. The negligence alleged was in not properly laying, placing, or keeping the grid or grating and sewer in proper order or repair, but in suffering and permitting the same to become and be in a broken, sunken, and dangerous condition, in consequence whereof the plaintiff, while lawfully riding her bicycle along the highway over the grid or grating, had the handle bars of the bicycle jerked from her hands, lost control of the bicycle, and was thrown on to the road and under the wheels of a carriage. The particulars of negligence alleged that the grid or grating was half an inch below the level of the frame in which it should have fitted and three or four inches below the level of the surrounding granite setts.

By s. 68 of the Metropolis Management Act, 1855 (1), all sewers as therein described situate in any parish mentioned in

---

(1) See note on p. 97, post.

Sched. A to the Act, with the gullies, grates, works, and things thereunto appertaining, became vested in the vestry of such parish; other sewers situate within any district mentioned in Sched. B to the Act, with all such works and things as aforesaid, became vested in the board of works for such district; and all sewers made and to be made within any such parish or district, except as therein mentioned, were vested in such vestry and board respectively.

By s. 69 of that Act the vestry of every parish mentioned in Sched. A to the Act and the board of works of every district mentioned in Sched. B were directed from time to time to repair and maintain the sewers vested in them, and to cause to be made, repaired, and maintained such sewers and works as might be necessary for effectually draining their parish or district.

By s. 96 of the Act every vestry and district board were to execute the office, to have all the powers and duties, and to be subject to all the liabilities of the surveyor of highways.

The Wandsworth district was one of the districts mentioned in Sched. B to the Act. One of the parishes in this district was the parish of St. Mary, Battersea (excluding Penge). The area of that parish comprised Lombard Road. In the year 1883 the Wandsworth District Board of Works constructed a gully with a grid or grating in connection with a sewer in Lombard Road, vested in them as aforesaid.

The parish of St. Mary, Battersea (excluding Penge), remained within the Wandsworth district until March 25, 1888, but from and after that date it ceased to form part of the Wandsworth district by virtue of s. 4 of the Metropolis Management (Battersea and Westminster) Act, 1887, which provided that "the principal Act"—i.e., the Metropolis Management Act, 1855—"shall be read and have effect as if the said parish excluding Penge had been named in Part II. of Schedule A of the said Act and the vestry of the said parish shall become and be a body corporate by the name of the Vestry of the Parish of St. Mary Battersea."

By s. 4 of the London Government Act, 1899, elective vestries in the county of London ceased to exist, and as the result of that section the powers, duties, property, and liabilities of the vestry of the parish of St. Mary, Battersea, were transferred to the defendants as successors to the vestry.

The learned judge put to the jury nine questions, which, with the answers thereto, were as follows:—

1. Was the accident to the plaintiff caused by the plaintiff riding over the gully?—Yes.

2. Was the accident to the plaintiff occasioned by negligence in the construction of the gully in allowing it to be below the roadway—

(*a*) by the road authority?—Yes.

(*b*) by the sewer authority?—Yes.

3. Was the accident to the plaintiff occasioned by negligence in construction of the gully itself—

(*a*) by the sewer authority?—Yes.

(*b*) by the road authority?—Yes.

4. Was the accident to the plaintiff occasioned by the negligence of the defendants in not remedying any defect in the gully owing to its being below the roadway—

(*a*) as sewer authority?

(*b*) as highway authority?—Both.

5. Was the frame of the gully broken, and to what extent?—Yes.

6. Was the accident due to this broken frame?—Contributory.

7. Were the defendants guilty of negligence as sewer authority in not repairing this frame?—Yes.

8. Were the defendants guilty of negligence as road authority in not repairing this frame?—Yes.

9. Damages?—1961*l.*

Cecil Fitch, for the plaintiff. The jury have found in answer to questions 2 and 3 that the grid or grating was negligently constructed originally. It follows that the Wandsworth District Board of Works were liable. Then by s. 4 of the Metropolis Management (Battersea and Westminster) Act, 1887, the Metropolis Management Act, 1855, is to be read and have effect as if the parish of St. Mary, Battersea, had been named in Part II. of Sched. A to that Act. If that parish had been so named the vestry of the parish would have been liable for the negligence either as sewer authority for breach of its duty under s. 69 or as highway authority for misfeasance under s. 96 of the Act of 1855. By s. 4 of the London Government Act, 1899, the defendants succeeded to all the liabilities of the vestry of the parish of St. Mary, Battersea.

Secondly, whatever may be the liability of the defendants as highway authority, they are certainly liable as sewer authority, not merely as succeeding to the liabilities already incurred of their predecessors, but for their own default in not maintaining and repairing this gully with its grid or grating: *White* v. *Hindley Local Board* (1); *Guardians of Holborn Union* v. *Vestry of St. Leonard, Shoreditch* (2); *Blackmore* v. *Vestry of Mile End Old Town* (3); *Meek* v. *Whitechapel Board of Works* (4); *Thompson* v. *Mayor, &c., of Brighton* (5); *Baron* v. *Portslade Urban Council.* (6) [*Shoreditch Corporation* v. *Bull* (7) and *McClelland* v. *Manchester Corporation* (8) were also cited.]

James H. Campbell, K.C., and *W. Warren*, for the defendants. Neither were the vestry of the parish of St. Mary, Battersea, nor are the defendants, their successors, liable to an action at the suit of any member of the public for mere failure to perform a statutory duty. A transfer to a public corporation of the obligation to repair does not of itself render the corporation liable to an action in respect of mere nonfeasance. In order to establish such liability it must be shewn that the Legislature has used language indicating an intention that this liability shall be imposed: *Cowley* v. *Newmarket Local Board* (9); *Municipality of Pictou* v. *Geldert* (10); *Saunders* v. *Holborn District Board of Works* (11); Beven on Negligence, 2nd ed., vol. i., pp. 303, 304. The cases of *Young* v. *Davis* (12) and *Parsons* v. *St. Matthew, Bethnal Green* (13) are instances of unsuccessful attempts to make public authorities liable for nonfeasance.

[HORRIDGE J. referred to *Mersey Docks Trustees* v. *Gibbs.* (14)]

---

(1) L. R. 10 Q. B. 219.
(2) (1876) 2 Q. B. D. 145.
(3) 9 Q. B. D. 451.
(4) (1860) 2 F. & F. 144.
(5) [1894] 1 Q. B. 332.
(6) [1900] 2 Q. B. 588.
(7) (1904) 90 L. T. 210.
(8) [1912] 1 K. B. 118.
(9) [1892] A. C. 345.
(10) [1893] A. C. 524.
(11) [1895] 1 Q. B. 64.
(12) (1863) 2 H. & C. 197.
(13) (1867) L. R. 3 C. P. 56.
(14) (1865) L. R. 1 H. L. 93.

Secondly, assuming that the making of this gully was an act of misfeasance on the part of the Wandsworth District Board of Works, there is no enactment transferring that liability to the vestry of the parish of St. Mary, Battersea, and, consequently, no enactment transferring the liability to the defendants. Sect. 4 of the Metropolis Management (Battersea and Westminster) Act, 1887, preserves the Wandsworth district and the board of works of that district. The proper inference is that they retained any liability they may have incurred.

Cur. adv. vult.

Dec. 20. HORRIDGE J. read the following judgment:—This was an action which was tried before me and a common jury and in which the plaintiff sought to recover damages for personal injuries occasioned to her through having fallen off her bicycle under a victoria owing, as she alleged, to the defective condition of a gully in Lombard Road, as to which road the defendants were both the highway and sewer authority at the time of the accident. I left certain questions to the jury, all of which they answered, and it was further agreed between counsel that I might draw any necessary inference of fact beyond those found by the jury.

The case for the plaintiff was put in three ways: (1.) it was said that the gully was negligently constructed originally and that the defendants, under the provisions of certain Acts of Parliament, were liable for such negligent construction; (2.) that the defendants as sewer authority were liable for not repairing the defect occasioned by the gully being so much below the roadway; (3.) the defendants as sewer authority were liable for the condition of the gully owing to a portion of the frame being broken. The jury found, firstly, in answer to questions 2 and 3, that the gully was negligently constructed; secondly, that the defendants were liable both as sewer authority and highway authority for negligence in not remedying the defect in the gully owing to its being below the roadway; thirdly, that the defendants, both as highway and sewer authority, were guilty of negligence in not repairing the defective condition of the gully in respect of the missing piece of it which had been broken off and which caused a hole at the edge of it. They further found that this defect in the condition of the gully contributed towards the accident, but they stated that they did not say it would not have happened without it, and that the condition of the gully also contributed. It was first submitted that there was no evidence which I could properly leave to the jury on any of these heads, but in my view there was evidence on all of them.

Assuming the findings of the jury to be correct, several questions arise. Did the original defective construction of the gully by the predecessors in title of the defendants—namely, the Wandsworth District Board of Works—render the defendants liable for the accident? This depends upon the construction of s. 4 of the Act 50 & 51 Vict. c. 17, amending the Metropolis Management Act, 1855. By the Metropolis Management Act, 1855, the Wandsworth District Board of Works were constituted the road and sewer authority for Lombard Road. By s. 4 of the amending Act, 50 & 51 Vict. c. 17, it was enacted that from March 25, 1888 (which date was some years after the work in question had been executed), the parish of St. Mary, Battersea, excluding Penge, should cease to be united with the parishes mentioned in Sched. B of the principal Act as forming the Wandsworth district and the principal Act should be read and have effect as if the said parish, excluding Penge, had been named in Part II. of Sched. A of the said Act, and the vestry of the said parish should become and be a body corporate by the name of the Vestry of the Parish of St. Mary, Battersea. The vestry of the parish of St. Mary, Battersea, thereby became the sewer and highway authority over Lombard Road. By s. 4 of the London Government Act, 1899, the vestry of the parish of St. Mary, Battersea, subsequently became the defendant corporation. The question to be decided is whether or not s. 4 of the Act 50 & 51 Vict. c. 17 (the amending Act) transferred pre-existing liabilities to the vestry of the parish of St. Mary, Battersea, or whether the true view is not that the Wandsworth District Board of Works remained liable for any matters which occurred during their administration, and that from March 25, 1888, the vestry were substituted as regards the exercise of powers. I think the latter view is the correct one, and that the liability in question was never transferred from the Wandsworth District Board of Works. I notice that in s. 4 of the London Government Act, where Parliament intended to say that liabilities should be transferred, it did so in plain language.

The next question is whether or not the defendants are liable as sewer authority for not having remedied the defect of the gully. Mr. Campbell contended before me that the principle of *Cowley* v. *Newmarket Local Board* (1) applied to a local authority in respect of whatever duties they were exercising, but I do not think this is the correct view, as I think that decision is strictly limited to their position as highway authority and ought not to be extended to their position when acting as other than highway authority. I think the true view of the position of a public authority which undertakes statutory duties is correctly laid down by Lush J. in *McClelland* v. *Manchester Corporation* (2), where he says: "If a duty is undertaken and improperly performed, and actual damage is occasioned thereby, the person injured has, as I have already stated, a perfectly good cause of action." The cases of *Meek* v. *Whitechapel Board of Works* (3), *White* v. *Hindley Local Board* (4), and *Blackmore* v. *Vestry of Mile End Old Town* (5) seem to me to shew clearly that the defendants are liable as sewer authority for not seeing that the inequality occasioned by their gully being so much below the roadway was remedied, and the jury having found against the defendants on this question the plaintiff is entitled to judgment upon it. I do not think the defendants would be liable in their capacity as highway authority for this.

In the last place, as the jury have found that the gully was broken at the time of the accident, and that such breakage contributed to the accident and was not repaired owing to the negligence of the defendants in both capacities, I think the defendants would be liable as sewer authority in respect of this cause of action, though not in their capacity as road authority.

For the reasons above I give judgment for the plaintiff for

---

(1) [1892] A. C. 345.

(2) [1912] 1 K. B. 118, at p. 133.

(3) 2 F. & F. 144.

(4) L. R. 10 Q. B. 219.

(5) 9 Q. B. D. 451.

1961*l.*, with costs, including the costs of the further hearing, before me, which I think ought to be costs in the action.

1913
PAPWORTH
v.
BATTERSEA
CORPORATION.

Judgment for plaintiff.

Solicitors for plaintiff: *W. W. Young, Son & Ward.*
Solicitor for defendants: *P. Caudwell.*

NOTE.—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 68: "Upon the commencement of this Act all sewers vested in the Metropolitan Commissioners of Sewers which are situate in any parish mentioned in Schedule A to this Act (except such sewers as are mentioned in Schedule D to this Act), with the walls, defences, banks, outlets, sluices, flaps, penstocks, gullies, grates, works, and things thereunto appertaining, and the materials thereof, ... shall become vested in the vestry of such parish; and all sewers vested in the said Metropolitan Commissioners which are situate within any district mentioned in Schedule B to this Act, except as before excepted, with all such works and things as aforesaid appertaining thereto . . . . shall become vested in the board of works for such district; and all sewers made and to be made within any such parish or district, except sewers and works vested or to be vested in the Metropolitan Board of Works as hereinafter mentioned, shall be vested in such vestry and board respectively."

Sect. 69: "The vestry of every parish mentioned in Schedule A to this Act, and the board of works for every district mentioned in Schedule B to this Act, shall (subject to the powers by this Act vested in the Metropolitan Board of Works) from time to time repair and maintain the sewers under this Act vested in them, ... and shall cause to be made, repaired, and maintained such sewers and works, or such diversions or alterations of sewers and works, as may be necessary for effectually draining their parish or district, ... "

Sched. B, Part I., to this Act included the Wandsworth district and, as one of its parishes, the parish of "St. Mary Battersea, excluding Penge."

Sect. 96: "Every vestry and district board shall, within their parish or district . . . . execute the office of and be surveyor of highways, and have all such powers, authorities, and duties, and be subject to all such liabilities, as any surveyor of highways in England is now or may hereafter be invested with or liable to by virtue of his office, under the laws for the time being in force, so far as such powers, authorities, duties, and liabilities are not inconsistent with this Act; . . . . and all streets being highways, and the pavements, stones, and other materials thereof, and all other things provided for the purposes thereof by any surveyor of highways, or by any person serving the office of surveyor of highways, or by any vestry or district board under this Act, shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situate."

1913

PAPWORTH v. BATTERSEA CORPORATION.

Metropolis Management (Battersea and Westminster) Act, 1887 (50 & 51 Vict. c. 17), s. 4: "From and after March 25, 1888,

"(1.) The parish of St. Mary Battersea excluding Penge shall cease to be united with the parishes mentioned in Schedule B of the principal Act"—i.e., the Metropolis Management Act, 1855—"as forming the Wandsworth district and the principal Act shall be read and have effect as if the said parish excluding Penge had been named in Part II. of Schedule A of the said Act and the vestry of the said parish shall become and be a body corporate by the name of the vestry of the parish of St. Mary Battersea;

"(2.) The parishes named in the said Schedule B (other than the said parish of St. Mary Battersea) as forming the Wandsworth district shall form the Wandsworth district for the purposes of the said Act;

"(3.) The Board of Works for the Wandsworth district shall continue to be a body corporate by the name of the Board of Works for the Wandsworth district: . . . . "

London Government Act, 1899 (62 & 63 Vict. c. 14), s. 4. sub-s. 1: "On the appointed day every elective vestry and district board in the county of London shall cease to exist, and, subject to the provisions of this Act and of any scheme made thereunder, their powers and duties, including those under any local Act, shall, as from the appointed day, be transferred to the council for the borough comprising the area within which those powers are exercised, and their property and liabilities shall be transferred to that council, and that council shall be their successors . . . ."

W. H. G.

[COURT OF CRIMINAL APPEAL.]

1913
Nov. 10;
Dec. 19.

THE KING *v.* THOMPSON.

Criminal Law—Pleading—Indictment—Duplicity—Objection—Appeal—"No substantial miscarriage of justice"—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 1.

An indictment under the Punishment of Incest Act, 1908, charged in one count that offences were committed "on divers days between the month of January, 1909, and October 4, 1910," and in another count that offences were committed "on divers days between October 4, 1910, and the end of February, 1913." At the trial, after the prisoner had pleaded not guilty and the jury had been sworn, objection was taken that the indictment was bad for duplicity. The objection was overruled and the prisoner was convicted On appeal:—

Held, that the indictment was bad in that it charged more than one offence in each count, but that, as the prisoner had not in fact been embarrassed or prejudiced in his defence by the presentment of the indictment in this form, there had been "no substantial miscarriage of justice," and that the appeal must, therefore, be dismissed under s. 4, sub-s. 1, of the Criminal Appeal Act, 1907.

Quære, whether an objection that an indictment is bad on its face can be taken after plea or after verdict?

Appeal from conviction.

The appellant, James Andrew Thompson, was indicted at the Durham Assizes for having committed offences under the Punishment of Incest Act, 1908 (8 Edw. 7, c. 45). The indictment (omitting formal parts) charged in the first count that the appellant "on divers days between the month of January, 1909, and the 4th day of October, 1910, being a male person unlawfully had carnal knowledge of a female person to wit Mary Eleanor Thompson who is and was to his knowledge his daughter" "and that the said Mary Eleanor Thompson at the time of the commission of the offences hereinbefore charged and stated was under the age of thirteen years." In a further count the indictment alleged the commission of the offence by the appellant with his said daughter "on divers days between the 4th day of October, 1910, and the end of February, 1913."

At the trial before Rowlatt J., after the appellant had pleaded not guilty and after the jury had been sworn, counsel for the appellant raised an objection to the indictment as being bad for duplicity. Counsel for the Crown submitted that it was too late to take an objection of this kind after the prisoner had pleaded and the jury had been sworn.

Rowlatt J. was of opinion that there was no substance in the objection and he allowed the case to proceed on the indictment as presented.

The prisoner was convicted and sentenced to four years' penal servitude.

Louis Hoare, for the appellant. Both counts of the indictment are bad for duplicity in that they disclose an indefinite number of offences. An indictment must give notice with certainty of the time when and the place where the offences charged have been committed and of the nature and number of those offences. One offence only can be charged in each count of the indictment. If an indictment is bad for duplicity it must be quashed: Hawkins' Pleas of the Crown, bk. 2, c. 25, s. 82. The defect in this case is not one of mere form, but of substance, and therefore the objection is one which may be taken at the trial either before plea or in arrest of judgment; formerly the objection could also have been taken after judgment by writ of error. On appeal to this Court it is immaterial at what stage of the proceedings the objection has been taken. The defect is not one which can be cured by verdict, for the verdict is equally open to uncertainty as to the number of offences and the Court is thus placed in a difficulty as to sentence. [*Nash* v. *The Queen* (1), *Reg.* v. *Heane* (2), and *Reg.* v. *Goldsmith* (3) were referred to.]

Bruce Williamson, for the Crown. The indictment is good. Although it is laid down in the books that an indictment which is double is bad and must be quashed, the authorities do not bear out that proposition. At common law it was no objection to an indictment that it included a number of offences of the same sort: Hale's Pleas of the Crown, vol. ii., p. 173; *Castro* v. *The Queen* (4), per Lord Blackburn; Archbold's Criminal Pleading,

(1) (1864) 4 B. & S. 935.
(2) (1864) 4 B. & S. 947.
(3) (1873) L. R. 2 C. C. R. 74.
(4) (1881) 6 App. Cas. 229, at p. 244.

24th ed., p. 82. In *Rex* v. *Jones* (1) Lord Ellenborough said: "In point of law there is no objection to a man being tried on one indictment for several offences of the same sort. It is usual in felonies for the judge, in his discretion, to call upon the counsel for the prosecution to select one felony, and to confine themselves to that; but this practice has never been extended to misdemeanours"; and Lord Blackburn pointed out in *Castro* v. *The Queen* (2) that any number of felonies and any number of misdemeanours might at common law be included in one count, and that in the case of misdemeanours it was by no means a matter of course that the party prosecuting should be put to election. Where the offences, as in the present case, are of a similar and continuing character the prosecution ought not to be called upon to select one case upon which to proceed. Apparently the only case in which an indictment has been quashed for duplicity is *Reg.* v. *Edmondes* (3), tried by Lawrance J. at the Cardiff Assizes, but that case is distinguishable, for there the indictment charged the defendant with three separate and alternative offences.

[Darling J. referred to *Rex* v. *Gover* (4) and *Rex* v. *Chandler.* (5)]

The objection having been taken after plea was too late, and the defect, if any, is now cured by the verdict: *Nash* v. *The Queen* (6); *O'Connell* v. *The Queen.* (7) Duplicity in an indictment was never a ground for a writ of error, though it might be raised by demurrer, but in the present case the authorities already cited shew that the indictment was not demurrable.

[Lush J. In *Reg.* v. *Philpotts* (8) an application to quash an indictment appears to have been made after plea and to have been granted.]

In that case the indictment disclosed no offence at all; it was not a question of duplicity. There is no foundation for the suggestion that a verdict found on this indictment is also objectionable as being uncertain. Uncertainty in a verdict or conviction may be objectionable if it places the prisoner in a difficulty as to pleading autrefois convict to a subsequent charge. But on this verdict the appellant could plead autrefois convict to an offence charged on any date between the dates alleged, and to that extent, therefore, this form of indictment is in the defendant's favour. [He also referred to *Reg.* v. *Devett* (1), *Rex* v. *Curtis* (2), *Rex* v. *Cohen* (3), and the Criminal Law Procedure Act, 1851 (14 & 15 Vict. c. 100), ss. 24, 25.]

---

(1) (1809) 2 Camp. 131.

(2) 6 App. Cas. at pp. 244, 245.

(3) (1895) 59 J. P. 776.

(4) (1662) 1 Keb. 357.

(5) (1699) 1 Salk. 378; 1 Ld. Raym. 581.

(6) 4 B. & S. 935.

(7) (1844) 11 Cl. & F. 155, at p. 414.

(8) (1843) 1 Car. & K. 112.

Lastly, the appellant was not prejudiced in his defence by the form of the indictment, and there has been no substantial miscarriage of justice. The appeal ought, therefore, to be dismissed under the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907 : *Rex* v. *Harris* (4); *Rex* v. *Edwards*. (5)

Hoare in reply referred to *Reg.* v. *Bowen* (6) and *Rex* v. *Roberts*. (7).

Isaacs C.J. The Court are of opinion that this appeal must be dismissed. The grounds of our decision will be stated on a future day.

1913. Dec. 19. The judgment of the Court (Isaacs C.J. and Darling, Bray, Lush, and Atkin JJ.) was read by

Isaacs C.J. The appellant was convicted under the Punishment of Incest Act, 1908 (8 Edw. 7, c. 45), of misdemeanours committed with his daughter, who had not, at the date of trial, attained the age of sixteen years.

The first count in the indictment charged him with having committed the offences "on divers days between the month of January, 1909, and the 4th day of October, 1910," the girl then being under the age of thirteen years. The second count charged him with having committed offences "on divers days between the 4th day of October, 1910, and the end of February, 1913." He appeals upon the ground that the indictment is bad for duplicity, or, in other words, that more than one offence is charged in each of the aforesaid two counts of the indictment. This objection was taken at the trial, and the judge was asked on this ground to quash the indictment, but not until the jury had been sworn and the prisoner had pleaded. It was contended for the Crown that an objection to an indictment for any formal defect apparent on the face thereof should be taken by demurrer or motion to quash before the jury were sworn and before the accused had pleaded. The judge held that there was no substance in the objection, and allowed the case to proceed upon the indictment as presented.

---

(1) (1838) 8 C. & P. 639.

(2) (1913) 9 Cr. App. Rep. 9.

(3) (1909) 3 Cr. App. Rep. 180.

(4) (1910) 5 Cr. App. Rep. 285.

(5) (1912) 8 Cr. App. Rep. 128.

(6) (1844) 1 Den. C. C. 22.

(7) (1692) Carth. 226.

At the hearing before this Court it was not, and indeed it could not be, disputed that the appellant had not thereby suffered any embarrassment or prejudice at the trial, inasmuch as in the depositions and during the trial offences were proved on specific dates of which the appellant had had ample notice, and for which the defence was fully prepared. Upon a perusal of the evidence, the offences had undoubtedly been committed, and there was no substantial defence apart from the defect above mentioned in the proceedings. The appeal was based solely on the irregularity of pleading in the indictment, which, according to the appellant's contention, entitled him to have the conviction quashed. It was urged before us that a prisoner was entitled to have sufficient notice of each offence charged against him, and that the effect of grouping a number of different offences in one count and charging the accused with having committed them " on divers days " between certain periods was an objection not merely of form, but one of substance, because it might prejudice the fair trial of the prisoner, but that even if it was only an objection of form it must prevail. In this case, as we have already stated, the prisoner was not in any way embarrassed or prejudiced, and we are of opinion that, although very high authorities have in the past expressed the opinion that, as a matter of law, even two offences of felony could be charged in the same count (see *Castro* v. *The Queen*, per Lord Blackburn (1)), the practice is uniform and well established, that several offences should not be charged in the same count, and the indictment in this case was irregular for that reason.

(1) 6 App. Cas. at pp. 244, 245.

We are of opinion that, there being a defect on the face of the indictment, the objection should, in strictness, be taken before plea, and, therefore, the technicality raised by the defence could be met by a technicality raised by the Crown, but this Court will always be very reluctant to lay down any hard and fast rule which would prevent the defence raising any objection based on an irregularity or defect in the proceedings at any time. We do not, therefore, decide that the objection may not be taken at a later period and even after verdict. The appellant contended that he could take the objection at any time, and could on such an indictment move in arrest of judgment after verdict. No case was cited as an authority for this proposition, and there are observations to the contrary in *Nash* v. *The Queen*.(1) It is, however, unnecessary for us definitely to determine this point in view of the conclusion announced by us at the hearing of the appeal.

We dismissed this appeal on the ground that, even assuming that the objection raised after plea to the defect in the form of indictment was not taken too late and that the appellant could have moved in arrest of judgment, no substantial miscarriage of justice had occurred, and that we were, therefore, bound to give effect to the proviso in s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, which is as follows: "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." If we had thought that any embarrassment or prejudice had been caused to the appellant by the presentment of the indictment in this form we should have felt bound to quash the conviction whatever our views might be as to the merits of the case. It must not be thought that we are deciding that such objections should not be allowed to prevail either at the trial or in this Court. An indictment so framed might undoubtedly hamper the defence, and if it did we should give effect to the objection. There are also other objections to an indictment which must be held good at any time, as, for example, an objection on the ground of want of jurisdiction.

---

(1) 4 B. & S. at p. 945.

One of the objects of s. 4 was to prevent the quashing of a conviction upon a mere technicality which had caused no embarrassment or prejudice. Whilst giving the right of appeal upon any wrong decision of any question of law, the object of the Legislature was that justice should be done in spite of a wrong decision and that the Court should not interfere if it came to the conclusion that, notwithstanding the wrong decision, there had been no substantial miscarriage of justice. The Court must always proceed with caution when it is of opinion that a wrong view of the law has been taken by the judge presiding at the trial, but when it is apparent, and indeed undisputed, as it is and must be in this case, that no embarrassment or prejudice had in fact been suffered in consequence of the pleader having made the manifest error above mentioned, the Court must act upon the proviso in this section of the Act.

A reference to the decisions of this Court will shew that this is the principle upon which appeals should be decided. In the case of *Rex* v. *Cohen* (1) the Court came to the conclusion that an amendment to an indictment ought not to have been made, but, there being no miscarriage of justice, the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, came into operation, and they therefore dismissed the appeal. In the case of *Rex* v. *Harris* (2) the decision was based upon the view that the indictment was bad, and the Court, assuming that the indictment was bad, were of opinion that the case came within the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, inasmuch as the jury had convicted on the clearest evidence and there was no appeal on the merits, and they found it impossible to say that any actual miscarriage of justice was occasioned. In the case of *Rex* v. *Edwards* (3) the Court came to the conclusion that the indictment was bad, but were asked to affirm the conviction on the ground that there had been no substantial miscarriage of justice in pursuance of the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907. Ridley J. in delivering the judgment of the Court referred to the decision of *Rex* v. *Harris* (2), but pointed out that the objection in that case was not taken at the trial, whereas in

(1) 3 Cr. App. Rep. 180.

(2) 5 Cr. App. Rep. 285.

(3) 8 Cr. App. Rep. 128.

1913

REX
v.
THOMPSON.

the case then before the Court it was taken in the Court below. There were, however, other reasons why the Court could not come to the conclusion that there had not been a substantial miscarriage of justice. There was an appeal also against the conviction on fact which the Court had not heard, and a communication had been received by the Court from the judge who presided at the trial which prevented the Court from coming to the conclusion that it would be right to affirm the conviction, notwithstanding that they had decided the point on the indictment in the appellant's favour, and for these reasons they quashed the conviction. It is obvious, on examination of that case, that there were cogent reasons why the Court could not affirm the conviction.

Applying the principle to be deduced from these cases, we are of opinion that the present case comes within the proviso to s. 4, sub-s. 1, of the Criminal Appeal Act, 1907, and we therefore dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *Registrar of the Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

F. O. R.

[COURT OF CRIMINAL APPEAL.]

1914
Feb. 9.

THE KING *v.* MANN.

Criminal Law—Attempted Suicide—Whether punishable with Hard Labour—"Attempt to commit felony"—Hard Labour Act, 1822 (3 *Geo.* 4, *c.* 114).

An attempt to commit suicide is an attempt to commit felony within the meaning of the Hard Labour Act, 1822, and is punishable with hard labour accordingly.

Appeal to the Court of Criminal Appeal.

The prisoner was convicted at the Bradford Quarter Sessions of an attempt to commit suicide and was sentenced to six months' imprisonment with hard labour. He appealed against so much of the sentence as imposed hard labour on the ground that it was not warranted by law.

Mockett, for the appellant. An attempt to commit suicide is a common law misdemeanour, punishable by fine or imprisonment without hard labour. The law is so stated in Lord Halsbury's Laws of England, tit. Criminal Law, s. 1198. By the Hard Labour Act, 1822 (3 Geo. 4, c. 114), it is provided that whenever a person is convicted of, amongst other misdemeanours, an "attempt to commit felony" the Court may order sentence of imprisonment with hard labour; and the question is whether suicide is a felony. The Legislature in the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), treats it as something distinct from felony, s. 1 of the Act providing that "No confession, verdict, inquest, conviction, or judgment of or for any treason or felony or felo de se" shall cause any forfeiture. Suicide is no doubt spoken of as self-murder, but in *Reg.* v. *Burgess* (1) it was held that an attempt to commit suicide was not an attempt to commit murder within the meaning of the statute 24 & 25 Vict. c. 100.

C. B. Johnson, for the Crown. Suicide is a felony. The term felo de se so implies. Blackstone treats it as "a peculiar species of felony, a felony committed on one's self": bk. iv., ch. 14.

---

(1) (1862) L. & C. 258.

1914

REX
v.
MANN.

The judgment of the COURT (Lord Reading C.J., Bankes and Avory JJ.) was delivered by

LORD READING C.J. In this case the appellant was convicted of an attempt to commit suicide and was sentenced to six months' imprisonment with hard labour. He now appeals against his sentence upon the ground that the offence is not one in respect of which a sentence of hard labour can be pronounced. The argument is based upon the decision in *Reg.* v. *Burgess* (1) and the language of the Forfeiture Act, 1870. With regard to *Reg.* v. *Burgess* (1) we think the suggestion that that case is to be regarded as a decision that an attempt to commit suicide is not an attempt to commit a felony is wrong. It did not purport to decide more than that the expression "attempt to commit murder" in s. 15 of the 24 & 25 Vict. c. 100 meant attempt to commit the murder of another person, and that therefore attempted suicide did not come within the section. Then with respect to the Forfeiture Act, 1870, which enacts that "No confession, verdict, inquest, conviction or judgment of or for any treason or felony or felo de se shall cause any attainder or corruption of blood, or any forfeiture or escheat," it was said that as felo de se is not classed with felonies, but treated as a class of offence by itself, that was a legislative recognition that it was not a felony. The answer to that is that suicide must be either a felony or a misdemeanour, and there is nothing to shew that before the Act of 1870 it was ever treated as a misdemeanour. The probable explanation of the language of the section is that there may have been some doubt to which of the two classes it belonged, and that the words "or felo de se" were inserted out of abundant caution. We are of opinion that an attempt to commit suicide is an attempt to commit a felony, and that the Act of George IV. consequently applies. The appeal therefore fails.

Appeal dismissed.

Solicitor for appellant: *Registrar of the Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

J. F. C.

---

(1) L. & C. 258.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D.
1913
July 15.
C. A.
Oct. 14, 15;
Nov. 24.

JOLLY *v.* BROWN AND OTHERS.

[1912 J. 1159.]

Landlord and Tenant—Covenant to Repair—Notice of Breach—Specification of particular Breach complained of—Addition of General Clause—Sufficiency of Notice—Conveyancing and Law of Property Act, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 14, *sub-s.* 1.

A notice was served under s. 14 of the Conveyancing and Law of Property Act, 1881, by the lessor of six small houses on the lessee stating that the repairing covenants in the lease had been broken and that the particular breaches which were complained of were the committing or allowing the dilapidations mentioned in the schedule annexed to the notice. The schedule, which was headed "Schedule of dilapidations allowed to accrue in and about the" houses, indicated under general headings repairs which were required to be done to all of them and in a few instances only specified repairs to be done to particular houses. In some instances it required the lessee to examine and repair specified parts of the houses. The schedule concluded with the words "and note that the completion of the items mentioned in this schedule does not excuse the execution of other repairs if found necessary":—

Held by the Divisional Court, that the notice was sufficient inasmuch as it gave to the lessee the materials necessary to enable him to ascertain the breaches of covenant of which the lessor complained, and neither the fact that the notice required the lessee to do repairs which he might not be liable to do under his repairing covenants nor the general clause at the end of the schedule invalidated the notice, inasmuch as the obligation upon the lessee was only to comply with the repairing covenants and not necessarily with the terms of the notice; and as the clause at the end of the schedule did not specify any breaches it was of no effect.

Held, in the Court of Appeal, by Buckley L.J. and Kennedy L.J. (Vaughan Williams L.J. dissenting), that the notice was a good and sufficient notice under s. 14 of the Conveyancing and Law of Property Act, 1881.

APPEAL of the plaintiff from a decision of an official referee.

On August 19, 1873, Martha Phillips Goodwin was entitled to six small houses known as 35, 37, 39, 41, 43, and 45, Menoth Street, Bethnal Green, London, for the residue of a term of eighty-eight years from September 22, 1837, under a lease dated March 17, 1838.

By an underlease dated August 19, 1873, Martha Phillips Goodwin demised the above-mentioned premises to one James Abbott from June 24, 1873, for the term of 52¼ years less three days. By that lease Abbott covenanted for himself, his heirs, executors, administrators, and assigns, that he would at all times thereafter during the continuance of the term thereby granted at his and their costs and charges well and sufficiently repair, uphold, support, maintain, pave, purge, scour, cleanse, empty, whitewash, tile, glaze, amend, and keep the demised premises and all party and other walls, fences, pavements, and glass windows thereunto belonging and all other erections and buildings and improvements which should at any time during the continuance of the said term be made to the demised premises with the appurtenances in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever when, where, and as often as need or occasion should require, and also would once in every third year from Michaelmas Day, 1870, paint all the outside and in every seventh year from Michaelmas Day, 1872, all the inside wood and ironwork of and belonging to the demised premises where the same had been usually painted before with two coats of proper oil colour in a workmanlike manner, and during the said term repair and keep in repair the road paving and footways fronting the said premises. Power was given by the underlease to the underlessor, her executors, administrators, and assigns, during the continuance of the term to enter upon the premises and examine the state and condition of the same and of all defects, decays, and want of reparation, cleansing, painting, and amendment then and there found and to give three calendar months' notice in writing to the lessee, his executors, administrators, or assigns, to repair and amend the same within the space of three months. The underlease also contained a provision that if the rent thereby reserved or any part thereof should be unpaid for twenty-one days next after any of the days appointed for payment, or if the lessee, his executors, administrators, or assigns, should not well and truly observe, perform, and keep all the covenants therein contained and on his and their part and behalf to be observed, performed, and kept, then in either of those cases it should be lawful for the lessor, her executors, administrators, and assigns, to re-enter upon the demised premises or any part thereof in the name of the whole and the same to have again, retain, repossess and enjoy as in their first and former estate and right, and expel, put out, and remove the said Abbott, his executors, administrators, and assigns, and all other tenants and occupiers of the demised premises.

The demised premises were at the date of the action vested in the plaintiff for all the residue of the term of eighty-eight years.

The underlease was at the date of the action vested in the defendant Fox, and the other defendants were his tenants in occupation of the demised premises.

On March 21, 1912, the plaintiff duly served, by leaving the same on the demised premises, a notice in writing stating that the repairing covenants contained in the underlease had been broken and that the particular breaches which were complained of were the committing or allowing the dilapidations mentioned in the schedule to the notice, and requiring the lessee to remedy such breaches and to make compensation in money to the plaintiff for such breaches, and also stating that on failure to comply with the notice within a reasonable time it was the plaintiff's intention to re-enter upon the premises and claim damages for breach of the covenants.

The following is a copy of the schedule to the notice:—

"Schedule of dilapidations allowed to accrue in and about the properties known as Nos. 35, 37, 39, 41, 43, and 45, Menoth Street, Bethnal Green.

"EXTERNAL.

"Roofs, etc.

"Examine, repair and reinstate all broken or loose tiles to main and w.c. roofs.

"Clean out and repair all gutters, downpipes, gullies and cesspools.

"Make good all cement fillets and all flushings.

"Leave the roofs sound and watertight.

"Rake out all defective joints of brickwork and point to chimney stacks.

"Make good all flounchings in cement.

"Remove cracked or broken chimney pots and reinstate with new.

"Clear away all rubbish from roofs.

"Fronts and backs.

"Rake out the whole of the pointing to brickwork of houses and water closets not less than ½ inch deep, brush down and repoint in fine mortar gauged with cement and neatly weathered.

"Repair defective brickwork, cutting out cracked, damaged or bulged portions and making good.

"Repair all window sills and cut out and reinstate broken sills where necessary.

"Point round all door and window frames where defective.

"Wash, stop and paint with two coats of good oil colour all woodwork to frames, sashes, doors and frames and other works before painted, the paint on front street doors to be burnt off before being repainted.

"Wash, stop and paint with two coats of good oil colour all cement dressings to windows and door openings, window sills and plinths.

"Repair and reinstate where necessary shutters to front windows, also rails to area and front steps.

"Provide new stonework round area grating at No. 41 and new length of stack pipe at No. 43.

"INTERNAL.

"Rooms and staircases generally.

"Hack off and make good all defective plastering.

"Repair all defective brickwork and partitions.

"Repair defective floors and skirtings.

"Repair woodwork of frames, sashes, linings, doors and frames, cupboards, dressers and shelves.

"Reinstate scullery door and frame at No. 35.

"Repair and reinstate sash-lines, beads, window and door fastenings, furniture and keys.

"Repair and reinstate defective stoves and chimney pieces, ranges, coppers and furnace work to same.

"Cut out all worn and broken treads, nosings and risers, repair and make good.

"Repair landings and other woodwork.

"Cut out and reinstate all defective and bulged ceilings.

"Wash, stop and whiten all ceilings.

"Strip all walls and repaper with wall paper at 6*d.* per piece p. c. value.

"Distemper walls of sculleries and water closets.

"Wash, stop and paint with two coats of good oil colour all work before painted.

"GENERALLY.

"Paint and bring forward in oil colour all repairs to wood and other work where before painted.

"Hack out and reinstate all broken glass.

"Examine and repair and put in good sanitary condition all sinks, cisterns, water closets, supply and waste pipes, ball valves, and taps, and all drains and gullies and flush out same.

"Repair and make good all fences and tar same.

"Reinstate fastenings to front shutters.

"Repair and cleanse all floors and pavings in yards.

"Well and substantially repair, uphold, maintain, and put the premises and appurtenances in thoroughly good repair and condition, and note that the completion of the items mentioned in this schedule does not excuse the execution of other repairs if found necessary."

The plaintiff alleged that a reasonable time for the remedy of such breaches as were capable of remedy and of making reasonable compensation in money to his satisfaction had elapsed without the breaches having been remedied or any compensation made to him for such breaches, and that he was therefore entitled to re-enter upon the demised premises.

The plaintiff on June 27, 1912, brought this action, in which he claimed possession of the demised premises, mesne profits, and damages for the breaches of the covenants in the underlease.

The defendant Fox by his defence pleaded (inter alia) that the notice in writing purporting to contain a schedule of dilapidations and purporting to specify breaches of the repairing covenants contained in the underlease did not in fact specify the alleged breaches of covenant complained of, and that by reason of such omission the notice was insufficient to comply with the requirements of s. 14, sub-s. 1, of the Conveyancing and Law of Property Act, 1881. (1)

The official referee held that the notice was not sufficient to comply with s. 14, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, and accordingly gave judgment for the defendant Fox.

The plaintiff appealed.

July 15. *J. E. Harman* and *W. de B. Herbert*, for the plaintiff. The notice gives the lessee ample information as to what he is required to do and is a sufficient notice under s. 14 of the Conveyancing and Law of Property Act, 1881. It is not necessary that every detail as to the work required to be done should be specified in the notice: *Piggott* v. *Middlesex County Council* (2); *Penton* v. *Barnett.* (3)

C. A. McCurdy, for the defendants. The notice does not specify any breach. It is simply a general request to repair. It does not specify to which houses the respective breaches of covenant refer. Further, it is bad by reason of the proviso that "the completion of the items mentioned in this schedule does not excuse the execution of other repairs if found necessary." A notice which merely says, as this does, that if the lessee does not comply with it in some unspecified way he will incur a forfeiture is bad: *Fletcher* v. *Nokes* (4); *In re Serle.* (5) Under

---

(1) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14, sub-s. 1: "A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

(2) [1909] 1 Ch. 134.

(3) [1898] 1 Q. B. 276.

(4) [1897] 1 Ch. 271.

(5) [1898] 1 Ch. 652.

s. 14 of the Conveyancing and Law of Property Act, 1881, the lessee is entitled to a notice specifying each particular breach of the repairing covenant which is made the subject of the complaint. This notice does not allege any breaches. It does not suggest that any of the defects enumerated in the schedule in fact exist. In substance it is a common form specification. There is nothing to indicate in which of the houses any particular defect exists. The lessee is entitled to know what the landlord complains of. The notice ought to indicate whether the breaches of covenant exist in all the houses or, if not, in which house they respectively exist. The concluding clause of the notice places upon the lessee the onus of judging at his own risk whether the specified repairs are sufficient. But under s. 14 of the Conveyancing and Law of Property Act, 1881, it is the duty of the lessor to specify the repairs he requires. The general words at the end of the notice are a modification of the earlier part of it. They in effect say that the matters mentioned are not the only things of which the lessor complains. In effect the lessee is told to find out what is necessary to avoid a forfeiture. The lessee is entitled to require the landlord to direct his mind to and specify the breaches of which he complains. The lessee is entitled to be put in a position in which he can calculate the whole cost of the repairs in order that he may decide whether he will repair or incur the forfeiture.

J. E. Harman in reply. In the circumstances of the present case the notice is sufficiently definite. There are several small houses and the complaint of the landlord is that they are all out of repair. [*Matthews* v. *Usher* (1) was also referred to.]

Avory J. I hesitate to differ from the decision at which the learned official referee has arrived because I know that he has had great experience in matters of this kind, but I have come to the conclusion that if the notice which was given by the landlord in this case is not sufficient, it will be difficult for any landlord to comply with the provisions of s. 14 of the Conveyancing and Law of Property Act, 1881. I think, upon examining the notice, that the real complaint to which it is open is, that it possibly calls upon the tenant to do repairs which may turn out not to be required and not necessary to be done under his covenant. The answer to that complaint is that the tenant is not bound by this notice to do everything specified in it. If in one of these houses, for instance, the roof was not defective he would not be bound to repair the roof, and similarly, if in another house the drains were not defective he would not be obliged to do anything to them. I think the tenant would be bound (and I can see no hardship in his being so bound) to make an examination or employ some person to do it on his behalf for the purpose of seeing whether it was necessary to repair the woodwork in each of these houses in order to comply with his covenant. It must be borne in mind that the obligation upon the tenant is to comply with his covenant to repair and not necessarily with the terms of the notice served upon him by the landlord. If at the trial it is found that he has complied with the terms of his covenant, it is immaterial that there are some matters contained in the notice which have not been complied with. The landlord has no right of ejectment if it turns out at the trial that the tenant has not committed a breach of his covenant. The object of the notice as explained by the decisions upon s. 14 of the Conveyancing and Law of Property Act, 1881, appears to be summed up in these words by North J. in *Fletcher* v. *Nokes* (1): "The notice ought to be so distinct as to direct the attention of the tenant to the particular things of which the landlord complains, so that the tenant may have an opportunity of remedying them before an action to enforce a forfeiture of the lease is brought against him." I think that is the proper test to be applied. Is this notice sufficient to give the tenant an opportunity of remedying the defects complained of by the landlord before the action is brought? As I have already said, I think the gravamen of the complaint against the notice is that it is too wide and gives too much notice to the tenant. I have only to add that if I had been satisfied that this notice was a mere printed form taken from a surveyor's office which had been served upon the tenant without any discretion being exercised upon what was to be included in

---

(1) (1899) 81 L. T. 542; [1900] 2 Q. B. 535.

(1) [1897] 1 Ch. 271.

it, I should have been disposed to hold that it was not a sufficient compliance with the Act. It is clear, however, upon examining the notice—and especially having regard to the fact that particular repairs are specified in respect of at least two of the houses—that it is impossible to say that this notice was a mere form sent out without examination into, and the exercise of discretion upon, the facts with regard to the particular houses in question. I am satisfied that such examination has been made and that such discretion has been exercised and that the form of notice sent to the tenant was a sufficient compliance with the section. That being so, this appeal must be allowed.

Lush J. I am of the same opinion. All that the landlord is bound to do under s. 14 of the Conveyancing and Law of Property Act, 1881, is to give to his tenant the materials necessary to enable him to ascertain what breaches of covenant he has committed. The object of the section is to enable a tenant who desires to carry out his obligations to do so and remedy the breaches of covenant. It is not the object of the section to enable a tenant who desires to avoid his obligations to trip up the landlord and make his action of ejectment abortive.

The great advantage which the section gives to the tenant is this: If the landlord in his notice only specifies particular breaches, then he cannot eject his tenant provided that the latter remedies those breaches, although it may be that there are other obligations which he has not fulfilled. In the present case there is a notice which admittedly specifies a large number of particular breaches of covenant. No doubt Mr. McCurdy is right in saying on behalf of the defendant that there is a general clause at the end of the notice which does not specify any particular breaches; but the tenant is not hurt by it, inasmuch as the landlord is only entitled to eject the tenant after particularizing the breaches of which he complains. If the tenant has complied with the particular requirements of the landlord, the latter would not be entitled to eject him because some general clause is added at the end of the notice which has no effect. I cannot help saying that in the present case if the tenant really desired to carry out his obligations he would have found no difficulty whatever in ascertaining what the breaches of covenant were of which the landlord complained. It is true that he is required in some instances to examine specified parts of the premises, but I do not think that that makes the notice bad. I think the landlord is entitled to say to his tenant, for example, "I complain of all your sinks as being out of repair. You must examine them and see if that is so." I do not think that the landlord is bound to do more than that when he is calling the tenant's attention to the breaches of covenant of which he complains. In the present case, although I disagree with the learned official referee with great hesitation, I think he was wrong in holding that the notice was not sufficient, and the case must therefore be remitted to him for hearing.

J. E. A.

The defendant Fox appealed.

Oct. 14. *Ernest Pollock, K.C.*, and *McCurdy*, for the defendant.

J. A. Harman and *W. de B. Herbert*, for the plaintiff.

The arguments and the cases cited were the same as in the Divisional Court.

Cur. adv. vult.

1913. Nov. 24. VAUGHAN WILLIAMS L.J. read the following judgment:—The question in this case is whether a notice given by a landlord to his tenant purporting to be a notice under the provisions of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 14, sub-s. 1, was a sufficient notice.

On March 21, 1912, the plaintiff served upon the defendant a notice with a schedule of dilapidations purporting to set forth the particular breaches of the covenants of the lease complained of by the plaintiff which are mentioned in the said schedule.

The notice required the tenant to remedy all the aforesaid breaches and to make compensation to the landlord in money for such breaches and concluded with these words: "On your failure to comply with this notice within a reasonable time it is our client's intention to re-enter upon the said premises and to claim damages for the breach of the said covenants."

The plaintiff was the superior lessor of certain premises known as Nos. 35—37, 39, 41—43, and 45, Menoth Street, Bethnal Green, comprised in a lease dated August 19, 1873, and made between Martha Phillips Goodwin of the one part and James Abbott of the other part.

The notice was addressed to the lessee of the house, buildings, and premises situate as in the said notice (being the six houses I have mentioned) and to all it may concern. The six houses were held by one of the defendants, Marks Fox, by virtue of an underlease, the other defendants being his tenants in occupation of the said premises respectively.

By the terms of the underlease Marks Fox was bound by a covenant to repair the premises and the underlease contained a proviso for re-entry upon breach of any of the covenants therein.

The six houses, containing six rooms each, were let to weekly tenants at rents estimated as being 11*s.* to 12*s.* a week.

The schedule of dilapidations attached to the notice served by the plaintiff on the defendants was headed: "Schedule of dilapidations allowed to accrue in and about the premises known as 35, 37, 39, 41, 43, 45, Menoth Street, Bethnal Green," and dealt with repairs stated to be necessary under general headings such as "roofs," "fronts" and "backs," "rooms and staircases generally," without (except in two or three cases) referring specifically to the repairs necessary in particular houses, and concluded as follows: "Well and substantially repair, maintain and put the premises and appurtenances in thoroughly good repair and condition, and note that the completion of the items mentioned in this schedule does not excuse the execution of other repairs if found necessary."

The writ in the action was issued on June 27, 1912, the defendants being the six occupiers of the respective houses and Fox, of whom they held.

Paragraph 6 of the statement of claim states that "On the 21st March, 1912, the plaintiff duly served by leaving the same on the demised premises a notice in writing with a schedule of dilapidations."

The defendant Marks Fox appeared to the action and by his defence set up (inter alia) that the notice purporting to contain

C. A.
1913

JOLLY
v.
BROWN.

Vaughan Williams L.J.

the schedule of dilapidations and to specify breaches of the repairing covenants contained in the underlease dated August 19, 1873, made between Martha Phillips Goodwin of the one part and James Abbott of the other part did not in fact specify the alleged breaches of covenant in this action complained of by the plaintiff, and says that the said notice was insufficient to comply with the requirements of s. 14, sub-s. 1, of the Conveyancing and Law of Property Act, 1881, by reason of the omission to specify the alleged breaches of covenant aforesaid.

In considering this defence it is convenient to consider first the terms of s. 14 of the Conveyancing Act, 1881: "A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

It is obvious that this case turns upon the sufficiency or insufficiency of the notice relied upon, and this question must depend upon the construction of s. 14, sub-s. 1, of the Conveyancing Act, 1881. It is said that the question of the sufficiency or the insufficiency is a question of degree, and I agree that in a sense it is, but in my judgment before deciding that the notice "in degree" complies or fails to comply one must construe the words of s. 14.

The giving of the notice required by s. 14 is a condition precedent to the commencement of the action. This condition in the words of the section is that "a right of entry or forfeiture under any proviso or stipulation in a lease for any breach of any covenant or condition in the lease shall not be enforceable by action or otherwise unless and until the lessor has served a notice on the lessee." The section goes on to define the notice thus required as a condition precedent to enable the landlord to enforce his right to re-entry or forfeiture.

One has first to construe the words of the section prescribing the essentials of the notice, and if any doubt arises as to what the defined essentials are, the Court may properly take into consideration the purpose of the notice as set forth in the section. I will first take the words of the section independently of the purpose. The words are "a notice specifying the particular breach complained of." I think that this means each particular breach complained of.

The covenant to repair in the lease in question is in the following terms: that "the lessee his executors administrators or assigns shall and will at all times hereafter during the continuance of the term hereby granted at his or their like costs and charges well and sufficiently repair uphold support maintain pave purge scour cleanse empty whitewash tile glaze amend and keep the said premises and all party and other walls fences pavements and glass windows thereunto belonging and all other erections and buildings and improvements which shall at any time during the continuance of the said term be made to the demised premises with the appurtenances in by and with all and all manner of needful and necessary reparations and amendments whatsoever when where and as often as need or occasion shall require and also shall and will once in every third year from Michaelmas Day 1870 paint all the outside and in every seventh year from Michaelmas Day 1872 all the inside wood and ironwork of and belonging to the said demised premises where the same have been usually painted before with two coats of proper oil colour in a workmanlike manner and during the said term repair and keep in repair the road paving and footway fronting the said premises."

This covenant, therefore, is very wide and extensive, and a breach of it might be committed in a number of particulars: for instance, failure to paint the inside every seven years would be a breach thereof, even though the premises were otherwise kept in the best state of repair, and it would clearly be an insufficient notice under the section if this were the breach relied on, and

Vaughan Williams L.J.

was not specifically mentioned, for the particular breach would not then be specified.

I think the authorities bear out this view. North J. in *Fletcher* v. *Nokes* (1) says: "The notice ought to be so distinct as to direct the attention of the tenant to the particular things of which the landlord complains, so that the tenant may have an opportunity of remedying them before an action to enforce a forfeiture of the lease is brought against him." Collins L.J. in *Penton* v. *Barnett* (2) thus states the principle: "I think that we ought to construe the words 'particular breach' in the section according to the obvious intention of the Legislature, which was that the tenant should be informed of the particular condition of the premises which he was required to remedy. The expression 'breach' means the neglect to deal with the condition of the premises so pointed out, and not merely failure to comply with the covenants of the lease." Kekewich J. in *In re Serle* (3) quotes both these decisions as truly stating the principle and held the notice in that case bad, because although it specifically stated "secondly, that you have not painted the outside wood and iron work in every third year of the term; thirdly, that you have not within each seven years of the term painted and whitened all the internal parts of the said premises where usually painted and whitened," yet in the statement of the first breach it states generally "that you have not kept the said premises well and sufficiently repaired and the party and other walls thereof," and did not further specify the breach. In fact the notice purported to complain of three particular breaches and was only sufficient as regards two, and did not give sufficient information as regards the first.

I do not think that the case of *Piggott* v. *Middlesex County Council* (4) conflicts with these cases. The notices in that case certainly specified each particular breach and required it to be remedied, though they did not specify the methods which were to be adopted by the lessees to remedy each breach, and this was held (and I think rightly) to be unnecessary.

Ridley J. in *Matthews* v. *Usher* (5), after stating that "the

(1) [1897] 1 Ch. at p. 274.
(2) [1898] 1 Q. B. at p. 281.
(3) [1898] 1 Ch. 652.
(4) [1909] 1 Ch. 134.
(5) 81 L. T. 542.

C. A.
1913

JOLLY
v.
BROWN.

Vaughan Williams L.J.

notice does not specify the repairs required in each particular house, but gives in copious detail every repair that may be required according to the condition of each house. In other words it is a general list of repairs such as pointing, painting, slating, reinstating, &c., where necessary"; and after summarizing the effect of the landlord's notice by the words "these are my requirements; you must ascertain which of the houses and in which part of them they must be carried out," says: "The notice is different from that which was the subject of the former decisions. Is it sufficient? The lessor does not specify what is to be done, but he says 'All this is to be done where required.' Does the tenant thus get notice of what he is required to do; or is the lessor to go further and specify in giving the notice each piece of work that is to be done in the same manner as though he were proving his damages in Court? I think upon the whole that the tenant who, as must be assumed, has broken the covenant, must on receipt of a notice like the present apply it to the premises; he must, on knowing what sort of work is required, do it where it is wanted."

I am unable to agree with the conclusion of the learned judge in that case. It appears to me that the notice must specify the particular breach, and require that breach to be remedied; and it is not a compliance with the statute to serve on the tenant a notice bidding him in effect to find out whether there are any breaches of covenant, and if there are to remedy them.

It was unnecessary for the Court of Appeal to deal with this point when the case was before them, as they held that the mortgagor was not the proper person to sue for possession at all.

In the argument before us the case principally relied on was the case of *Penton* v. *Barnett* (1), a case which only dealt with the question of the necessity to give a new notice in respect of the non-repair after the lapse of time specified in the notice, but in which Collins L.J. used the words: "I think however that we ought to construe the words 'particular breach' in the section according to the obvious intention of the Legislature, which was that the tenant should be informed of the particular condition of the premises which he was required to remedy. The expression

(1) [1898] 1 Q. B. 276.

'breach' means the neglect to deal with the condition of the premises so pointed out, and not merely failure to comply with the covenants of the lease. The common sense of the matter is, that the tenant is to have full notice of what he is required to do. He has had notice and has failed to act on it; and with regard to that the physical condition of the premises which he was required to make good was the same when the action was brought as when the notice was given. Under these circumstances, I agree that the requirements of the Conveyancing Act have been complied with, and that the tenant has, within the meaning of s. 14, had notice of the breach of covenant which is the foundation of the action."

In my opinion there is nothing in the case of *Penton* v. *Barnett* (1) or in the observations of Collins L.J., or of the other members of the Court, which in the slightest degree conflicts with the construction of s. 14 as laid down in *Fletcher* v. *Nokes* (2) by North J. in the following passage: "The main ground of my conclusion that the notice is insufficient is this. Suppose that s. 14 had not been passed, and the previous law had remained in operation, and the landlord had brought an action against the tenant for breach of covenant, the first thing which the landlord would have been compelled to do would have been to give particulars of the breaches on which he relied, in order that the tenant might know what he had to meet. I think that s. 14 was intended to place the tenant in a better position than he was in before. He was to have the option of doing, before action brought, all those things the neglect of which would have been the ground of relief against him if s. 14 had not been passed. It is impossible to suppose that the tenant was intended to be before action in a worse position, with respect to alleged breaches, than he would formerly have been in after action."

It seems to me that it is absolutely necessary, in construing s. 14, to give some meaning to the word "particular" in the phrase "specifying the particular breach." The material words of the notice are "the above-mentioned covenants have been broken and the particular breaches which are complained of are the committing or allowing the dilapidations mentioned in the schedule hereto"; and turning to the schedule I will take as examples the passages relating to "roofs, etc." "Examine and repair and reinstate all broken or loose tiles to main and w. c. roofs" and "Clean out and repair all gutters down-pipes gullies and cesspools." It may be that the notice given would fall within the words "a notice specifying the 'breach,'" but I cannot think that the words in either of the cases I have cited fall within the sentence "specifying the particular breach." The two passages that I have cited are a fair example of the particularity contained in other parts of the schedule. If the construction of the words of the section is doubtful, then in my opinion the purpose of the section as set forth in its later words is most important, and on this point I call to mind the words of North J. in *Fletcher* v. *Nokes* (1) which I have cited above. Is it reasonable to expect the lessee to make compensation in money unless and until he knows the particular breaches which the landlord intends to make the subject of his notice and complaints, or is it reasonable, in a case in which the tenant has done that which he considers necessary for, say, the cleaning and repairing of all gutters, down-pipes, and cesspools, to leave him liable to be sued because he has overlooked something which the landlord intended to cover by his general notice, and which the landlord would have specifically to state in the particulars which he would have to give after action brought? In the present case the particulars have been delivered in the action and it is very arguable, if not absolutely clear, that the particulars in the action do not coincide with the particular breaches complained of in the notice. It is impossible to suppose that the "tenant was intended to be before action in a worse position with respect to alleged breaches than he would formerly have been in after action."

---

(1) [1898] 1 Q. B. 276.

(2) [1897] 1 Ch. 271.

When the tenant has to consider the quantum of compensation which he shall offer to the landlord, the fact that the landlord has been too general and has not given sufficient particulars in the specification of the breaches complained of must necessarily hamper the tenant. It does not remedy this difficulty to say that in the action he will not recover in respect of such breaches.

(1) [1897] 1 Ch. 271.

Vaughan Williams L.J.

Again, one object of the notice of the particular breaches complained of is to require the lessee to remedy the breach and in any case to make compensation in money for the breach. Now if the breaches are too large or too small the tenant will be embarrassed in his work of remedy or failing to remedy in his offer of compensation. The fact that the particulars of breaches in the action differ from those in the notice will in the absence of any remedial works having been done be evidence that the original notice was too large, or if the particulars are too small may leave the tenant to make too small an offer of compensation. The particulars should coincide with the notice.

I think this appeal should be allowed.

Buckley L.J. read the following judgment:—On March 21, 1912, the plaintiff in this action served upon the defendant a certain notice requiring the defendant as lessee to remedy certain breaches of covenant of which the plaintiff complained. Subsequently, on June 27, 1912, the plaintiff commenced the present action. The action was referred to the official referee. The defendant contended before the official referee that the notice of March 21, 1912, was not a notice sufficient under s. 14 of the Conveyancing Act, 1881. That was the only question argued. No evidence was adduced. The preliminary objection that the notice was not sufficient under the Act succeeded before the official referee, and he gave judgment for the defendant with costs. On appeal the Divisional Court reversed that decision and held that the notice was valid. The defendant appeals to us.

In the action the plaintiff delivered, as he was bound to deliver, particulars of the breaches in respect of which his action was brought. The defendant's counsel have made frequent reference to these particulars as if they had some bearing upon the question which this Court has to decide. In my opinion they have none. If the particulars in the action include breaches other than those included in the notice of March 21 the plaintiff will no doubt be unable to rely upon them in the action. All this is matter for the future when the action is tried. At present I have no concern with anything but the notice of March 21, and have only to inquire whether that was such a notice as that the plaintiff could bring an action based upon failure on the part of the lessee to remedy the breaches of which complaint was made in that notice.

The Act of Parliament provides that a right of re-entry or forfeiture for breach of covenant in a lease shall not be enforceable unless the lessor serves on the lessee a notice specifying the particular breach complained of, and if the breach is capable of remedy requiring the lessee to remedy the breach. In that sentence "breach complained of" means (see the earlier words of the section) breach of a covenant in the lease of which the lessor complains. He must specify the particular breach of the covenant in question. What he has to do is to give a notice specifying the particular breach of a covenant in the lease of which he makes complaint. If the breach complained of be breach of a covenant to repair, the obvious intention of the Legislature is that the attention of the tenant shall be particularly called to the particular condition of the premises which the tenant is required to remedy, so that he may remedy it if he be so minded. The right of re-entry or forfeiture arises upon neglect on the part of the tenant to remedy the condition of the premises to which his attention is thus called. It is not, for instance, sufficient that the lessor should give the tenant notice that he has broken the covenant to repair. The tenant is entitled to know how he is said to have broken it. For instance, that he has broken it by not reglazing broken windows, or by not rebuilding a demolished party wall, or by not keeping the roof in proper repair. But the lessor is not bound to go on and say the broken windows are situate at such and such places or the repair which the roof requires is to replace so many tiles or slates found in such and such positions. The notice must be one which calls the tenant's attention to the particular condition of the premises which is alleged to be defective. It need not identify every defect in the conditions to which attention is called. The breach of a covenant must arise by either doing or neglecting to do some act. The particular breach complained of is specified when the act which the tenant has done or which the tenant has neglected to do is specifically pointed out. This is done when the lessor says you have not repaired the roof or you have not glazed the windows. The argument has largely proceeded in my opinion upon a confusion between two things which are distinct, namely, specifying the particular breach complained of and giving particulars of the breaches complained of. The lessor is bound to do the former, he is not bound to do the latter. It is no objection that he leaves it to the tenant to find the particular defects in that condition of the premises to which the tenant's attention is called. A notice, for instance, to repair the defective plastering and a notice to rake out the defective joints of the brickwork and repoint the chimney stacks (these are two instances taken from the notice in this case) are good and sufficient notices, for they have given the tenant notice of the class of condition which the lessor says is defective, and the identification of the particular places in which the defects occur is rightly left to the tenant himself.

Reading the notice of March 21 in the light of these observations, I am of opinion that it was a valid and sufficient notice under the Act of Parliament. That is the whole question which is at present for decision. The action must go on with the result that if the lessor, when the evidence is adduced, satisfies the tribunal that the particular breaches complained of in the notice have been committed and have not been remedied by the lessee, he will be entitled to judgment, and none the less because it is (if it is) the fact that by his particulars in the action he has gone beyond the particular breaches complained of in his notice. In my judgment this appeal fails and must be dismissed with costs.

Kennedy L.J. read the following judgment:—In my judgment the decision of the Divisional Court in favour of the plaintiff was right and ought to be affirmed. The plaintiff is the landlord of a row of six small houses in Bethnal Green. The defendant Brown, who is the lessee of all those houses (his co-defendants are tenants in occupation under him), was sued by the plaintiff in the action which gives rise to the present appeal, the plaintiff claiming therein to recover possession of the demised premises on the ground of breach of repairing covenants contained in the lease, and, before the commencement of the action, the plaintiff served upon the defendant Brown (whom I shall call the defendant) a notice with a schedule of dilapidations specifying the breaches of covenants complained of, on account of which, unless remedied, he intended to claim a forfeiture of the lease to the defendant.

The single question for our determination is whether that notice was a sufficient compliance with the statutory requirement, contained in the Conveyancing and Law of Property Act, 1881, s. 14, sub-s. 1, which, in the language of North J. in *Fletcher* v. *Nokes* (1), has made the service on the lessee of a notice specifying the particular breach complained of a "condition precedent" to the enforceability of a right of re-entry or forfeiture under any proviso or stipulation in a lease, for any breach of any covenant or condition in the lease. In the present case the learned judges in the Court below, Avory and Lush JJ., differing from a learned official referee, who had dismissed the action upon a preliminary objection as to the sufficiency of the notice served upon the defendant, have held that the notice was amply sufficient. I entirely agree with them. That which is necessary to constitute a good notice is, according to the judgment of Lord Collins (then Collins L.J.) in *Penton* v. *Barnett* (2), to be that it should give the lessee full notice of what he is required to do. That, he said, was the common sense of the matter. In the case of *In re Serle, Gregory* v. *Serle* (3), decided by Kekewich J. somewhat later in the same year, in which a notice merely informing the lessee, so far as the covenant to repair was concerned, that he had not kept the said premises well and sufficiently repaired and the party and other walls thereof, was rightly held an insufficient notice, and it was held that this insufficiency was not cured by particularity of statement in regard to other breaches of covenant, the learned judge, after referring to the judgment of Lord Collins in *Penton* v. *Barnett* (2) which I have cited, also quoted with approval the view expressed by North J. in *Fletcher* v. *Nokes.* (1) "The notice ought to be so distinct as to direct the attention of the tenant to the particular things of which the landlord

---

(1) [1897] 1 Ch. at p. 274.

(2) [1898] 1 Q. B. at p. 281.

(3) [1898] 1 Ch. 652.

C. A.
1913

JOLLY
v.
BROWN.

Kennedy L.J.

complains, so that the tenant may have an opportunity of remedying them before an action to enforce a forfeiture of the lease is brought against him." The question of sufficiency of notice must, in each case, be a question of degree. I cannot find any sufficient ground for holding that the defendant in the present case, after perusal of the notice delivered by the plaintiff, did not know, in the words of Lord Collins, "the particular condition of the premises which he was required to remedy," or, in the words of North J., "the particular things of which his landlord complains." The schedule, which covers in my copy some 2¼ closely written pages, is, on the face of it, a very ample one, and its contents particularize, as it appears to me, quite sufficiently for the information of the tenant, the character and the position of the work which ought to have been done and which it is alleged still requires to be done, both externally and internally.

When the complaint of the landlord is, as I should judge it to be here, that the block of premises such as these has been allowed to get into disrepair in almost every direction, to hold a notice bad which gives the amount of detail which is given here would seem to me to impose upon the landlord needless labour which the statute never intended. How could the tenant in this case honestly say, you have not told me what you say is out of repair? Indeed, as Avory J. points out in his judgment, the real complaint of the defendant about the notice, when it is examined, appears to be that it is too full and possibly calls upon the defendant to do repairs which ought not to be required to be done under the covenant. But this, as Avory J. proceeds further to point out, constitutes no act of objection to the notice as a notice under the statute. If, when the trial takes place, the landlord fails to prove the justice of any of his complaints, so much the better for the tenant. But the fact that the notice may turn out to contain allegations of breach of covenant which cannot be substantiated cannot, as it seems to me, affect the validity of the notice as a statutory notice. That depends, not upon the justice of its allegations, but upon the sufficiency of the information which it gives. The learned counsel for the defendant in the course of argument dwelt at some length upon the reductions or differences which he alleged to appear in the particulars

C. A.
1913

JOLLY
v.
BROWN.

Kennedy L.J.

delivered by the plaintiff in the pleadings in the action when compared with the terms of the notice. I must confess myself unable to see the relevancy of the particulars to the single point, the sufficiency of the notice as a statutory notice, which we have to consider on this appeal. The purpose of those pleaded particulars is to set out the complaints of the plaintiff in regard to non-repair as they exist at the date of the writ. The breaches complained of in the notice may at the later date have been wholly or partly remedied, or may have been found by the plaintiff to be non-existent. In any case their extent or their sufficiency as particulars can have no sort of bearing upon the question whether the "condition precedent" of the previous notice to satisfy the requirement of the statute has or has not been performed. I concur with the Divisional Court in its judgment in favour of the plaintiff and in the reasons which Avory and Lush JJ. have given for that judgment.

Appeal dismissed.

Solicitors for plaintiff: *Syrett & Sons.*
Solicitor for defendant: *Alexander Rubinstein.*

W. J. B.

1914
Jan. 14.

JAY'S FURNISHING COMPANY *v.* BRAND & CO. AND ANOTHER.

Distress—Rent—Exemptions—Goods of Stranger—"Goods comprised in hire-purchase agreement"—Law of Distress Amendment Act, 1908 (8 *Edw.* 7, *c.* 53), *s.* 4.

The plaintiffs let furniture to the tenant of a flat under a hire-purchase agreement which provided that: "If the hirer does not duly perform and observe this agreement, the same shall ipso facto be determined, and the hirer shall forthwith . . . . return the said goods to the owners, and the owners shall be entitled to retake possession of the same as being goods wrongfully detained by the hirer, and for that purpose to enter on any premises where the goods may be."

The hirer having fallen into arrear with his weekly payments under the agreement, the plaintiffs served upon him a written notice that the agreement was terminated and demanding the return of the goods; and they endeavoured unsuccessfully to retake possession. On the next day the landlord distrained upon the goods for arrears of rent of the flat where the goods were:—

Held, that the goods were at the time of the distress "comprised in a hire-purchase agreement," within the meaning of s. 4 of the Law of Distress Amendment Act, 1908, and therefore were not protected from distress by ss. 1 and 2 of the Act.

Appeal from the Brompton County Court.

By a hire-purchase agreement, dated March 8, 1913, the plaintiffs let to one Bray certain furniture at the weekly rent of 11*s.* 6*d.*, and Bray agreed to punctually pay the rent weekly commencing on March 27, and not to remove the goods from the flat where he resided. The agreement further provided that "If the hirer does not duly perform and observe this agreement, the same shall ipso facto be determined, and the hirer shall forthwith at his own expense return the said goods to the owners [the plaintiffs], and the owners shall be entitled to retake possession of the same as being goods wrongfully detained by the hirer, and for that purpose to enter upon any premises where the said goods may be. Notwithstanding such return or retaking of the said goods, the hirer shall remain liable for arrears of hire up to the date of such determination of this agreement"; that "The hirer may terminate the hiring by giving the owners one week's notice and at the expiration thereof delivering up to them the said goods, without prejudice to the owners' right to recover any arrears of rent and damages for any injury to the said goods and any costs expenses or payment that the owners may have been put to in order to get possession of the said goods"; and that "If this agreement be duly performed by the hirer, the hirer may, at any time during the continuance thereof, provided the rent be regularly paid in the manner aforesaid, purchase by a cash payment the said goods of the value named in the schedule hereto, in which case credit shall be given for the amount paid for option and rent paid. The parties hereto expressly agree that the hirer shall in no case be entitled to any credit for the said amount paid for option or for the said rent, or any part thereof, except on purchase of the said goods under the provisions of this agreement, and that the said goods shall otherwise remain the property of the owners subject to the provisions of this agreement only."

Bray paid the weekly rent due on March 27 and April 3 and 10, in each case a few days late, and it was accepted by the plaintiffs. The rent becoming due for each of the following four weeks was not paid, and the plaintiffs, in each week, sent a written application for payment. On May 8 Bray wrote promising to pay the four weeks' arrears on May 9. On May 14 the plaintiffs wrote to Bray as follows: "We beg to give you notice that the hiring agreement which we entered into with you has now been terminated and that we demand the return of our goods. Please see same are handed over to our representative." This letter was placed in the letter-box at Bray's residence, but he had then left and never actually received the letter. On the same day the plaintiffs sent a van to remove the furniture, but were unable to do so owing to the premises being locked up. On May 15 Bray's landlord levied a distress upon the premises for arrears of rent due from Bray and the goods in question were seized. On May 16 the plaintiffs served upon the bailiff a notice, under s. 2 of the Law of Distress Amendment Act, 1908, stating that Bray had no right of property or beneficial interest in the goods distrained upon, but that they were the property of the plaintiffs and were not goods to which the Act was expressed not

1914

JAY'S FURNISHING COMPANY *v.* BRAND & CO.

to apply.(1) The landlord, however, refused to give up the goods except upon payment of 9*l.* 14*s.* 6*d.* for rent and costs. The plaintiffs paid that sum under protest, and brought this action against the bailiff and the landlord to recover the amount as damages for illegal distress.

The county court judge found that default had been made on March 27 and continuously since, but that the plaintiffs had waived that default and treated the agreement as still subsisting, and that it was so treated by Bray and was not repudiated by him until after the distress; and he held that the agreement was not dead and that the goods were still comprised in it, and that the case was governed by the decision in *Hackney Furnishing Co.* v. *Watts.*(2) Judgment was accordingly given for the defendants. The plaintiffs appealed, with leave.

Schwabe, K.C., and *F. Hinde*, for the appellants. If the goods were not comprised in a hire-purchase agreement at the time when the distress was levied, the provisions of the Law of Distress Amendment Act, 1908, apply, and they were exempt from distress. The county court judge seems to have decided that the clause providing that the agreement shall be determined upon breach of its provisions had been waived and had therefore become entirely inoperative. But any waiver there may have been could only operate in respect of previous breaches committed and could not entirely destroy the clause. If notice was necessary on the part of the owners, such notice was given before the distress, and was sufficiently given by being left at the house of the hirer.

The effect of the particular clause in this agreement is that upon breach, or at any rate upon notice given by the owners, the agreement to let the furniture is finally determined and the hirer becomes a mere wrongful holder of the goods, so that they are no longer "comprised in a hire-purchase agreement" within the meaning of s. 4 of the Act. This case is clearly distinguishable from *Hackney Furnishing Co.* v. *Watts*.(1) In that case there was no clause, such as that in the present case, that upon breach the agreement should ipso facto be determined, and the decision was that, upon the true construction of that agreement, the hire-purchase agreement was still in existence and comprised the goods at the date of the distress. Here, the further provisions, that the owners may retake the goods and that the hirer shall remain liable for arrears of hire, simply state what would be the position apart from any such provisions and cannot have the effect of making the agreement continue as a subsisting hire-purchase agreement.

---

(1) 8 Edw. 7, c. 53, ss. 1 and 2, exempt from distress the goods of a stranger upon certain conditions; and—

Sect. 4: "This Act shall not apply—(1.) to goods . . . . comprised in any . . . . hire-purchase agreement . . . ."

(2) [1912] 3 K. B. 225.

E. Grimwood Mears, for the respondents, was not called upon to argue.

Ridley J. The furniture in question in this case was let on hire by the plaintiffs to one Bray, upon the terms of a hire-purchase agreement, at a rent of 11*s*. 6*d*. a week. Bray paid the first three instalments, though not punctually. After that he made no further payment, and applications for payment were made to him by the plaintiffs; and on May 14 they gave him a written notice that the agreement was terminated and demanded the return of the furniture. The plaintiffs contend that the whole agreement was then determined and the furniture became their exclusive property and was no longer comprised in the hire-purchase agreement. On May 15 the landlord distrained upon this furniture and refused to give it up to the plaintiffs until they paid the arrears of rent and costs under protest. The plaintiffs had served upon the bailiff the declaration required by s. 1 of the Law of Distress Amendment Act, 1908, and allege that he is therefore guilty, under s. 2 of the Act, of an illegal distress. The county court judge came to the conclusion that the plaintiffs were not entitled to recover, and we think that he was right.

The question depends upon the construction of the Law of Distress Amendment Act, 1908. Sect. 1 provides that, if a landlord levies a distress upon goods of any person other than the tenant, that person may serve upon the landlord or bailiff a

(1) [1912] 3 K. B. 225.

declaration that the tenant has no beneficial interest or right of property in the goods and that they are the property of such person and are not goods to which the Act is expressed not to apply; and s. 2 provides that, if the landlord proceeds with the distress after being served with the declaration, he shall be deemed guilty of an illegal distress. Then s. 4 says that the Act shall not apply to goods "comprised in any hire-purchase agreement." The only question in this case is whether these goods were comprised in the hire-purchase agreement at the time of the distress. If they were, then they are excepted from the provisions of the statute, and the landlord had a right to distrain upon them, as is clearly stated in the judgment of Bray J. in *Hackney Furnishing Co.* v. *Watts.* (1) That case is really on all fours with the present case, except that the clause as to non-payment of the rent is not quite the same. There the clause was as follows: "In case any of the said rent shall be in arrear or in case the hirer commit any breach of this agreement . . . . the owners shall thereupon, without formal demand, be entitled to resume possession of the said articles . . . ." The Court in that case decided that that clause did not give power to determine the agreement but only to determine the bailment. In the present case there is a stronger clause in favour of the plaintiffs, because it does not merely say that the owners shall have power to determine the bailment, but that on breach by the hirer the agreement shall "ipso facto be determined." Those words are certainly stronger than those in the clause in *Hackney Furnishing Co.* v. *Watts* (1), and we have to decide whether that difference in the words makes this case different in the result. We have come to the conclusion that it does not. In this case the material clause goes on to say that the owners shall be entitled to retake possession of the goods and for that purpose to enter upon any premises where the goods may be. It seems to me that the owners, if they acted upon that provision, would be treating the agreement as being still in existence. If the owners wished to retake possession, they could not do so by entering premises and forcibly taking the goods, except under the provisions of the

(1) [1912] 3 K. B. 225.

agreement. In *Patrick* v. *Colerick* (1) Parke B. said: "All the old authorities say that where a party places the goods upon his own close, he gives to the owner of them an implied licence to enter for the purpose of recaption . . . . The reason of the judgment of the Court of Common Pleas (2) is, that it was not shown who placed the goods there; and that the mere fact of the defendant's goods being on the plaintiff's land is no justification of the entry, unless it is shown that they came there by the plaintiff's act." I think that that shews that it would only be by reason of this agreement that the owners would have a right to enter and retake possession of the goods. Upon that ground I think that these goods were at the date of the distress comprised in the hire-purchase agreement, within the meaning of s. 4. The result is that we agree with the decision of the county court judge, but not, as at present advised, with the reasons which he gave for his decision. The appeal therefore fails.

Bankes J. I agree. I think that the conclusion to which the county court judge came was right, but I agree with what Ridley J. has said as to the grounds of his decision. I base my judgment entirely upon the point whether, upon the true construction of this agreement, this furniture, which was seized under a distress for rent, was comprised in a hire-purchase agreement within the meaning of s. 4 of the Law of Distress Amendment Act, 1908.

The object of that statute was to exempt certain classes of goods from the common law right of the landlord to distrain all goods on the demised premises; but s. 4 expressly provides that certain classes of goods, including goods "comprised in any hire-purchase agreement," shall not be within the exemption. Now a hire-purchase agreement was in fact made between the plaintiffs and Bray on March 8, 1913. It is an agreement containing many provisions, some creating and some regulating the bailment, and some providing the conditions upon which it is to determine; and clause (*f*) defines the rights and powers of the owners after determination of the bailment. All these provisions are comprised in the same agreement. The agreement is in a

(1) (1838) 3 M. & W. 483.

(2) *Anthony* v. *Haney* (1832) 8 Bing. 186.

form rather different from the agreement in *Hackney Furnishing Co.* v. *Watts* (1), and I presume that this form was made different in order, if possible, to avoid the consequences of the decision in that case. The difference in this case is that, whereas in the former case the provision was that on breach of the agreement the owners might resume possession of the goods, in the present case it is provided that on breach by the hirer the agreement shall "ipso facto be determined"; but in the same breath this agreement goes on to say in effect that it shall not be determined, because it provides what is to happen afterwards if the owners desire to enforce that provision.

We must construe this agreement as a whole, and we cannot treat it as being dead or finally determined merely upon breach by the hirer. Some of its provisions may be determined, but the agreement itself is not dead or determined. This is shewn by the fact that the plaintiffs themselves sought to take advantage of the provisions of the agreement in their favour by endeavouring to enter the premises of the hirer and retake possession of the furniture. How can it be said that the goods were then no longer comprised in the hire-purchase agreement? In my opinion it is impossible so to contend. I think that this point was expressly dealt with by Bray J. in his judgment in *Hackney Furnishing Co.* v. *Watts* (1), and I agree with what he there said. I am of opinion that the county court judge came to a right conclusion, because although in the event which happened the hirer might no longer have the right to retain the goods, yet they were still comprised in the hire-purchase agreement.

Appeal dismissed.

Solicitors for appellants: *Tredgolds.*
Solicitor for respondents: *W. M. Bellamy.*

---

(1) [1912] 3 K. B. 225.

J. H. W.

OELKERS *v.* ELLIS.

[1912 O. 1316.]

1913
Nov. 29 ;
Dec. 6.

Contract—Rescission—Fraud — Concealed Fraud — Limitation Act, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3.

The plaintiff claimed to set aside certain transactions between himself and the defendant relating to the purchase of shares in a mining company and to recover moneys paid by him to the defendant in respect thereof. The ground of the claim was the fraud of the defendant in pretending to act as the plaintiff's stockbroker while in fact selling to the plaintiff the defendant's own shares. The transactions took place in and before August, 1906. The plaintiff did not discover the fraud until July, 1912. The action was commenced in November, 1912. The defendant used no means to conceal the cause of action. The plaintiff was guilty of no laches or other default in failing to discover the fraud earlier :—

Held, that the Limitation Act, 1623, was no bar to the action.

Bulli Coal Mining Co. v. *Osborne* [1899] A. C. 351, and *Molloy* v. *Mutual Reserve Life Insurance Co.* (1906) 94 L. T. 756, followed.

Gibbs v. *Guild* (1882) 9 Q. B. D. 59 discussed.

Further Consideration before Horridge J. after trial of the action before the learned judge and a special jury.

The plaintiff was a person of independent means living in Wiesbaden, in Germany. The defendant was at all material times a stockbroker and a member of the London Stock Exchange.

The action was brought by the plaintiff on his own behalf and also as trustee for his sister, Marie Oelkers. He claimed in his own right to set aside certain transactions entered into by him with the defendant relating to the purchase of shares in the South Burma Tin Mine, the Dolgelly Copper Mines, and the Cove Copper Mines. With regard to the South Burma Tin Mine shares the defendant, although originally employed in earlier transactions as broker, sent contract notes to the plaintiff purporting to deal with him as principal, but the shares were by arrangement between the parties taken in the defendant's name and had not been assigned or transferred to the plaintiff. The plaintiff had paid to the defendant in respect of them the sum of 2714*l.* 17*s.* 6*d.* The company went into voluntary liquidation in May, 1908, and the plaintiff received from the liquidator through the defendant the sum of 28*l*. 2*s*. 6*d*. The plaintiff claimed to rescind this transaction and to recover from the defendant the sum of 2686*l*. 15*s*.

With regard to the Dolgelly Copper Mines shares a certificate was obtained in the plaintiff's name for 3000 shares on June 7, 1911. The plaintiff had paid to the defendant in respect of these shares the sum of 3481*l*. 5*s*. He claimed to rescind this transaction and to recover the amount so paid.

The transactions relating to the South Burma Tin Mine shares took place between November 21, 1905, and August 24, 1906; those in connection with the Dolgelly Copper Mines shares took place between March 26 and November 8, 1907.

The plaintiff also claimed as trustee for his sister to set aside certain transactions in the South Burma Tin Mine and to recover the money paid by him as trustee in respect of those transactions. (1)

The writ was issued on November 7, 1912.

Some four years before the issue of the writ one Mutschler was about to commence an action against the defendant. He wrote to the plaintiff's sister, Marie Oelkers, asking if she would join him in the action which he was bringing because, as he said, he had been swindled and defrauded by the defendant. This letter was shewn to the plaintiff. Mutschler brought an action of *Mutschler* v. *Ellis* against the defendant to set aside certain similar transactions in South Burma Tin Mine shares on the ground that the defendant while purporting to act as a stockbroker had sold his own shares. The case was heard before Bray J. and a special jury, and judgment was given for the defendant. The plaintiff appealed. The appeal was heard on July 4, 1912, before Vaughan Williams, Fletcher Moulton, and Buckley L.JJ., who reversed the judgment of Bray J. and entered judgment for the plaintiff for the agreed amount of 742*l*. The defendant then appealed to the House of Lords. The appeal was heard on November 28, 1912, and dismissed. (2)

(1) The plaintiff failed to establish his claim in relation to the Cove Copper Mines, and his claim as trustee for his sister. It is not thought necessary to refer to these claims further.

(2) Reports of the appeals to the Court of Appeal and the House of

The plaintiff's claim in the present action was formulated in two ways: First, it was said that he was induced to enter into the transactions through the defendant falsely and fraudulently representing to him that he was ready and willing to give the plaintiff expert and honest advice and to act in the plaintiff's interest with reference to transactions in and about the real purchase and sale of stocks and shares, whereas the defendant was never ready and willing to give the plaintiff expert or honest advice or to act as his stockbroker or in his interest, but on the contrary that the defendant acted as a principal and sold to the plaintiff shares which were the defendant's own property, whereby the measure of the plaintiff's profit was necessarily the defendant's own loss. The representations were contained in numerous letters written by the defendant to the plaintiff between September 25, 1905, and November 13, 1908.

Secondly, it was said that the defendant was employed by the plaintiff to act, and acted, as the plaintiff's stockbroker, and that whilst so employed, without any due or sufficient notice, he acted as a principal in respect of the sale of the shares.

The plaintiff in his amended statement of claim alleged that he first became aware of the fraud and breach of duty of the defendant in or about the month of July, 1912, and not before, through the publicity given to the defendant's dealings with one Mutschler in the action of *Mutschler* v. *Ellis*.

The defence consisted of a general traverse of the allegations made in the amended statement of claim; and further and in the alternative the defendant pleaded that as to all the South Burma Tin Mine shares, if he was under any liability therefor (which he denied), he would rely upon the Statute of Limitations (21 Jac. 1, c. 16), as a bar to any claim in respect of the same.

It was admitted in the course of the case that the defendant's employment was in the first instance the ordinary employment as a stockbroker and that he dealt on behalf of the plaintiff as his broker in a number of transactions in connection with

---

Lords appear in *The Times* newspaper of July 5 and November 29, 1912, respectively. The transactions and the causes of action appear to have been similar to those in the present case.

1913

OELKERS
v.
ELLIS.

American and South African stocks. On November 7, 1905, the defendant wrote and made suggestions to the plaintiff with regard to dealing in shares in mining companies, and it was admitted on behalf of the defendant that in the transactions with regard to the South Burma Tin Mine and the Dolgelly Mines he had in fact sold the plaintiff his own shares. The jury found that the plaintiff was induced to purchase the shares in the South Burma Tin Mine, the Dolgelly Copper Mines, and the Cove Copper Mines by the false and fraudulent representations of the defendant to the effect above set out. They also found that the defendant did not make it perfectly plain to the plaintiff that he could not rely upon his disinterested advice and must transact with the defendant as an ordinary buyer would with an ordinary seller.

Sanderson, K.C., and *H. H. Gaine*, for the defendant. The plaintiff cannot recover in respect of the transactions relating to the shares in the South Burma Tin Mine. As to these transactions he bases his claim (1.) upon the defendant's breach of duty as a stockbroker; (2) upon fraud in selling the defendant's own shares while he was purporting to act as a broker. The cause of action for breach of duty is barred by the Limitation Act, 1623. As to the cause of action for fraud:—

1. There was no representation of any existing fact, but merely a promise to do something in the future. Such a promise is not a sufficient ground for avoiding a transaction entered into on the faith of it: Leake on Contracts, 6th ed. (1911), pp. 233, 234. The real cause of action is breach of contract, and that was barred by the Limitation Act, 1623.

2. Even if there was fraud, the right to rescind the transactions was barred in equity on the analogy of the statute. Where a Court of Equity assumes a concurrent jurisdiction with Courts of law, no account will be given after the legal limit of six years if the statute be pleaded. For where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation. This is

the meaning of the common phrase that a Court of Equity acts by analogy to the Statute of Limitations, the meaning being that where the suit in equity corresponds with an action at law, which is included in the words of the statute, a Court of Equity adopts the enactment of the statute as its own rule of procedure: *Knox* v. *Gye* (1), per Lord Westbury. If it were otherwise the Statute of Limitations could be easily evaded by taking proceedings in equity instead of at law. To prevent the statute from running there must be a concealment of the cause of action: *Gibbs* v. *Guild.* (2) In that case an action was brought for damages for fraudulent misrepresentation. To a plea of the statute the plaintiff replied that he did not discover and had not reasonable means of discovering the fraud within six years, and that the existence of the fraud was fraudulently concealed by the defendant until within six years, before action. The Court of Appeal held this to be a good reply. Fraudulent concealment of the cause of action is necessary in order to take the case out of the statute. This is clear from the judgment of Brett L.J. in *Gibbs* v. *Guild.* (3) Speaking of the practice of the Courts of Equity in the case of concealed fraud he says: "They did not construe the statute so as to give an equity, they adopted an equity which was quite independent of the statute, but which no doubt had an effect on the transaction notwithstanding the statute, that is to say, they said if the existence of the cause of action given by the defendant was fraudulently concealed by the defendant from the plaintiff until a period beyond six years, then they would not allow the defendant to prevent the plaintiff from supporting his right to his remedy on the ground that the statute was a bar. It seems to me that there is some little confusion in the expressions used in some cases as to the origin of the cause of action being a fraud. That is not the fraud which raises the equity; but if there was a cause of action, and if its existence was fraudulently concealed from the plaintiff by the defendant who had given that cause of action, it was then that the plaintiff's equity arose notwithstanding that his cause of action had arisen more than six years before."

---

(1) (1872) L. R. 5 H. L. 656, at p. 674.

(2) 9 Q. B. D. 59.

(3) 9 Q. B. D. 59, at p. 68.

3. This is an action to rescind a transaction on the ground of fraud, an equitable form of relief, subject to special conditions imposed by the Court of Chancery upon a person seeking relief, one of which was that he should lose no time in applying to the Court. Laches and acquiescence deprive the plaintiff of his remedy. These defences are independent of the Statute of Limitations. After discovering the fraud, or after being put upon inquiry as to the bona fides of the transaction, a party is not allowed to wait for six years before he claims to rescind. He must act promptly. In the present case the plaintiff was put upon inquiry in the year 1908 when the letter from Mutschler to Miss Marie Oelkers came to his knowledge: *Ashley's Case.* (1)

4. There can be no rescission without restitutio in integrum: *Clarke* v. *Dickson* (2); *Sheffield Nickel Co.* v. *Unwin.* (3) It is too late to offer to return shares after the company has been wound up. [*Waddell* v. *Blockley* (4) was also referred to.]

Holman Gregory, K.C., and *Valetta*, for the plaintiff. The plaintiff is entitled to recover in respect of the South Burma Tin shares, and the Statute of Limitations is no bar to his action. The argument for the defendant, namely, that the statute runs against a claim for fraud unless there has been a fraudulent concealment of the cause of action, cannot be supported. Its origin is in the phrase "concealed fraud." That phrase in most cases means simply "undiscovered fraud." Where the plaintiff has been defrauded and, through no fault of his own, has failed to discover the fraud, the statute does not run against him. The point is concluded by authority. The case of *Gibbs* v. *Guild* (5) was not a decision upon it, but upon a different question, namely, whether the reply in that case was an answer to the plea, which it clearly was. Only by misapplying certain expressions of Brett L.J. in that case can any doubt be thrown upon the point. The question was settled by the House of Lords in *Booth* v. *Earl of Warrington.* (6) The facts in that case were these. The Earl of Warrington was desirous of marrying a young lady. Booth, who was uncle to the Earl, charged himself with the preliminary

(1) (1870) L. R. 9 Eq. 263.

(2) (1858) E. B. & E. 148.

(3) (1877) 2 Q. B. D. 214.

(4) (1879) 4 Q. B. D. 678.

(5) 9 Q. B. D. 59.

(6) (1714) 4 Bro. P. C. 163.

negotiations, which in the end were successful. Booth told the Earl that in order to bring about the marriage he had found it necessary to deposit certain securities in the hands of one Jackson, and to enter into a bond for the payment of 1075*l.* to one Isaacson, and that he had paid that sum to one Towers. Believing these statements to be true, the Earl paid to Booth 1050*l.* and 15*l.* by way of interest. Nine years afterwards he discovered that he had been defrauded by Booth and filed a bill in Chancery to recover back the 1050*l.* and 15*l.* interest. Lord Chancellor Harcourt declared "that he was far from being satisfied that there ever was any such agreement as in the answer touching the payment of the 1000 guineas, or that there were any such persons as Isaacson, Jackson, or Towers, or that they had any power to influence the match or were ever represented to have such power, or that any money was paid by the defendant"—i.e., Booth—"on the bond pretended to have been entered into by him; but that the same appeared to have been set up on a fraudulent account, and upon a misrepresentation of the defendant, and was not really executed by him; and that therefore the plea of the Statute of Limitations ought not to avail him anything." Subsequently it was decreed that Booth should pay the Earl the 1000 guineas and 15*l.* interest. The defendant appealed to the House of Lords. One of the questions put to the judges by the House of Lords was: "Supposing the fraud not to have been discovered till six years after the cause of action accrued, whether a Court of Equity be barred from giving relief in such case on a bill to be commenced after the six years?" The judges must have answered this in the affirmative, because it was finally ordered and adjudged that the appeal should be dismissed and the order and decrees therein complained of affirmed. In *Rolfe* v. *Gregory* (1), an action for fraudulently misappropriating trust funds, Lord Westbury L.C. said: "As the remedy is given on the ground of fraud, it is governed by this important principle, that the right of the party defrauded is not affected by lapse of time, or, generally speaking, by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed." Lastly, in *Bulli Coal Mining Co.* v. *Osborne* (1) Lord James of Hereford, delivering the opinion of the Judicial Committee of the Privy Council, at a Board of which Lord Macnaghten was a member, said: "Now it has always been a principle of equity that no length of time is a bar to relief in the case of fraud, in the absence of laches on the part of the person defrauded. There is, therefore, no room for the application of the statute in the case of concealed fraud, so long as the party defrauded remains in ignorance without any fault of his own. The contention on behalf of the appellants that the statute is a bar unless the wrong-doer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as to the principles of equity." The effect of this doctrine of "concealed fraud," as it is often inappropriately called, is that the Statute of Limitations does not run against the defrauded party until he has discovered the fraud. On discovery a cause of action first accrues, and the plaintiff, in the absence of special circumstances amounting to laches or acquiescence, has six years within which he may issue his writ: *Gibbs* v. *Guild* (2), per Lord Coleridge C.J.

---

(1) (1865) 4 D. J. & S. 576, at p. 579.

If the plaintiff can recover in respect of these shares it follows a fortiori that he can recover in the case of the Dolgelly Copper shares. In neither case has there been any such change of position as would preclude him from recovering the money he has paid.

Cur. adv. vult.

Dec. 6. HORRIDGE J. delivered a written judgment which, after stating the facts, continued as follows: The questions therefore resolve themselves into whether or not the plaintiff can recover the moneys paid by him in respect of (1.) the South Burma Mine, (2.) the Dolgelly Mines, and in each case as to whether be can succeed on the ground of (*a*) fraud, and (*b*) breach of duty as a broker. To deal first with the question of breach of duty, the jury have found that the defendant did not give due notice that he was acting as principal and that the relationship of broker and customer had been changed into the relation of two principals. In the previous case of Mutschler, who sought to avoid the transaction between himself and the defendant on the ground that the defendant had not given such proper notice, it was held by the Court of Appeal and the House of Lords that the plaintiff in that action was entitled to recover. As I read the judgments both of the Court of Appeal and the House of Lords, they seem to me to decide that in a case where all the transactions were contained in written documents, and where the plaintiff did not under cross-examination shew he in fact knew the defendant was principal, the question whether due notice was given or not was one for the judge. I, however, thought it safer to take the opinion of the jury upon this question, reserving to myself the right afterwards to say what my own view was if it was a question for me. If it is a question for me I have no hesitation in saying that I find the defendant gave no such notice. In my view the plaintiff is, apart from the Statute of Limitations as regards the question raised with regard to the South Burma Mine claim, entitled, if, within the words of Lord Shaw in his opinion in the House of Lords in Mutschler's case, "matters are entire," to set aside both transactions and to recover the moneys paid. For reasons which I shall give later on in my judgment I think the matters were entire, and that the plaintiff is entitled to recover under this head 2686*l.* 15*s.* as regards the South Burma Mine, and as regards the Dolgelly Mines the sum of 3481*l.* 5*s.*, but that his claim under this form of action as regards the South Burma Mine is barred by the Statute of Limitations.

---

(1) [1899] A. C. 351, at p. 363.

(2) 9 Q. B. D. 59, at p. 65.

As regards the claims based upon fraud, the defence was raised on behalf of the defendant (1.) that there was no evidence that I could properly leave to the jury on the question of fraud, and as regards the claim in respect of the South Burma Mine (2.) that the claim was barred by the Statute of Limitations. As regards there being no evidence of fraud I think the jury were entitled to look at the whole of the defendant's dealings with regard to the mining shares in question, and then to see whether or not the correspondence shewed that he was leading the plaintiff to think that he was acting as broker so as to retain the plaintiff as a useful purchaser of the shares in which he was dealing both as buyer and seller, whilst at the same time using words to some extent indicating that he was a principal in some of his documents and upon which he might rely in case his transactions were afterwards brought into question. [The learned judge referred to two letters written by the defendant, one with regard to South Burma shares and the other with regard to Dolgelly shares, as being in themselves sufficient to raise the question of the defendant's honesty of purpose, and continued :] Assuming that I was right in leaving the question of fraud to the jury and they having found fraud with regard to both the South Burma and Dolgelly transactions, does their finding as to the South Burma Mine shares prevent the defendant from relying upon the Statute of Limitations? There was no evidence here that the defendant actively concealed the fraud found by the jury, and it was contended therefore before me that on the authority of *Gibbs* v. *Guild* (1) the plaintiff could not succeed. There is no doubt that, in dealing with the question whether since the Judicature Acts a replication in an action for fraud that the defendant had been guilty of fraudulent concealment within six years was a good replication, Brett L.J. says (2): "It seems to me that there is some little confusion in the expressions used in some cases as to the origin of the cause of action being a fraud. That is not the fraud which raised the equity; but if there was a cause of action, and if its existence was fraudulently concealed from the plaintiff by the defendant who had given that cause of action, it was then that the plaintiff's equity arose notwithstanding that his cause of action had arisen more than six years before"; but the actual decision in that case was that the replication as pleaded was good. It is true that if the Court of Equity does not allow the statute to be a bar to a claim of fraud, even though there is no active concealment, a replication in that case would not have been necessary, but the actual decision was that the replication as pleaded was an answer to the defence, and having regard to the later case of *Bulli Coal Mining Co.* v. *Osborne* (3) I think that I ought only to regard the case of *Gibbs* v. *Guild* (1) as a decision upon the particular point involved and to read it as not in conflict with the later case which laid down the wider rule.

(1) 9 Q. B. D. 59.

(2) Ibid. at p. 69.

(3) [1899] A. C. 351.

It is also noticeable that in his judgment Brett L.J. (1), in dealing with the questions propounded for the consideration of the judges in *Booth* v. *Earl of Warrington* (2), says that the question was "Supposing the fraud not to have been discovered till six years after the cause of action accrued, whether a Court of Equity would be barred from giving relief in such case on a bill to be commenced after the six years," and in this question so stated there is no mention of concealment.

I now come to the case of *Bulli Coal Mining Co.* v. *Osborne* (3), in which Lord James of Hereford in delivering the judgment of the Privy Council, which consisted of Lord Macnaghten, Lord Morris, and Lord James of Hereford, says (4): "The contention on behalf of the appellants that the statute is a bar unless the wrong-doer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as to the principles of equity." He also cites with approval the language of Lord Westbury L.C. in *Rolfe* v. *Gregory* (5): "The right of the party defrauded is not affected by lapse of time, or, generally speaking, by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed."

In my view therefore the questions propounded in *Booth* v. *Earl of Warrington* (2), the judgment of Lord Westbury L.C. in *Rolfe* v. *Gregory* (6), and the judgment of Lord James of Hereford in *Bulli Coal Mining Co.* v. *Osborne* (3), all shew that when once fraud is established the rights of the defrauded party are not affected by the Statute of Limitations so long as he remains in ignorance of the fraud, and that, although the replication in *Gibbs* v. *Guild* (7) was held to have been rightly pleaded, that case is in no way in conflict with the other authorities I have mentioned, and it is worthy of note that Lord James of Hereford in *Bulli Coal Mining Co.* v. *Osborne* (8) says expressly that the conclusion arrived at in that case is not in conflict with any authority.

---

(1) 9 Q. B. D. at p. 71.
(2) 4 Bro. P. C. 163.
(3) [1899] A. C. 351.
(4) Ibid. at p. 363.
(5) 4 D. J. & S. 576, at p. 579.
(6) 4 D. J. & S. 576.
(7) 9 Q. B. D. 59.
(8) [1899] A. C. at p. 365.

It was, however, contended on behalf of the defendant that even assuming that the claim for fraud would not be barred by the statute, yet still the party defrauded had not six years from the discovery of the fraud, but must bring his action within a reasonable time after making the discovery. In this case it was contended that, inasmuch as Mutschler, the plaintiff in the other action, wrote to the sister of the present plaintiff about four years ago asking her to join in the action which he was bringing against the present defendant, and this letter was shewn to the present plaintiff, therefore he was put upon inquiry as to the facts and must be taken to have discovered the fraud at this time. In my view there was no evidence that the plaintiff in this action had any knowledge at that time that the defendant acted as a principal, and he expressly stated in his evidence that Mutschler did not write that the defendant had been acting as principal and selling his own shares, and that he did not specify what charge he was making, but only said that he was swindled and defrauded. I do not think there was then any such notice to the plaintiff in this action of the facts which he subsequently ascertained for the purposes of this action, nor was there any evidence that he delayed taking proceedings after he had really ascertained the facts. If the plaintiff must, contrary to my view, be taken to have ascertained the facts four years ago, there is the question as to whether or not a plaintiff on discovering a fraud has six years to bring his action in equity by way of analogy to the six years fixed by the Statute of Limitations. In *Rolfe* v. *Gregory* (1) I notice that Lord Westbury L.C. finds that the fraud became known some time in 1858, whereas from the facts of the case it appears that the bill was not filed until April 17, 1862, and he says: "The right of the party defrauded is not affected by lapse of time . . . . so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed," but if it is held that on discovery he has a shorter time within which to bring his action than he would have had otherwise, then his right is in fact affected by the time which elapsed before he made his discovery; and Lord Coleridge C.J. expressly says in *Gibbs* v. *Guild* (2) that "a fresh cause of action accrues from the

---

(1) 4 D. J. & S. 576.

(2) 9 Q. B. D. 59, at p. 65.

1913

OELKERS
v.
ELLIS.

Horridge J.

moment that the fraud is discovered and that to that fresh cause of action the Statute of Limitations will be applied by the Courts of Equity."

The later case of *Molloy* v. *Mutual Reserve Life Insurance Co.*(1) seems to me to deal expressly with the point. Romer L.J. says (2): "In a case where a fraud has been committed, the defrauded person may have two remedies. He may have an action for damages at common law; or he may have, possibly, in a case like the present, an equitable remedy for rescission of contract. If he brings his action at common law he has to take care that he is not met by the plea of the Statute of Limitations, which would be a good plea in answer to his claim, though based on fraud, if he knew all the main relevant circumstances on which his claim in respect of the fraud was based more than six years before action brought. Now, if instead of bringing his action at law, he seeks the equitable remedy, it is true that the Statute of Limitations does not directly apply. But it applies indirectly, for it is settled law that where it is only a question of the remedy and you come into equity with a case such as I am considering for the purpose of getting equitable relief, then the equity of the Court acts by analogy to the Statute of Limitations, and will not allow the plaintiff to succeed if his action is brought more than six years after knowledge of the facts has been acquired by him which justify his coming to the Court. Therefore we have to consider in the present case what the plaintiff knew more than six years before this action was brought for rescission."

I therefore hold that the Statute of Limitations is no bar to the claim for fraud in connection with the South Burma Tin Mine.

The remaining question which I have to decide is whether or not the plaintiff is entitled to repudiate the transactions and to recover back the money paid. Mr. Sanderson also relied upon the alleged delay as being an election not to repudiate the contract on the ground of fraud. As I have already said, I do not think that the plaintiff had any real knowledge four years ago, but even if he had I do not think anything he did can be regarded as an election. Mr. Holman Gregory did not ask for damages, but made his claim upon the basis of being entitled to repudiate. This point depends upon whether, to use the words of Lord Shaw, "matters are entire." The facts with regard to the South Burma Mine seem to be that, although the defendant purported to have sold to the plaintiff the shares in question and it was a portion of the arrangement for dealing in the shares that they should be taken in the defendant's name, no shares were ever allotted to the plaintiff in the sense that they could in any way be identified. The defendant, no doubt, always held shares of a sufficient number in his own name to supply to all his various purchasers shares to the amount they had bought, but there is nothing to shew that even the shares in his own name always remained the same. The company went into voluntary liquidation in May, 1908, and was dissolved by virtue of the Companies Acts at some later period, but before action brought. In winding up, a sum of money was paid as dividend on all the shares held by the defendant, and he credited the plaintiff with a proportionate part of that dividend on the shares standing in his, the defendant's, own name, but the true position seems to me to be that there never was any performance of the contract of sale on the part of the defendant, and the plaintiff in this action never was a shareholder in the company, and after giving credit for the 28*l.* 2*s.* 6*d.* he is entitled to recover in respect of the South Burma Tin Mine shares the sum of 2686*l.* 15*s.*

---

(1) 94 L. T. 756.

(2) Ibid. at p. 761.

As regards the Dolgelly shares the plaintiff never got any certificate for his shares, nor were any shares specifically allotted until June 7, 1911, when Mr. Bury, who succeeded the defendant, obtained the certificate in the plaintiff's name for 3000 shares. This action was commenced on November 7, 1912, and I have no evidence before me of anything having taken place which prevents the plaintiff from being in a position to transfer those shares to the defendant and to obtain back from him all moneys paid in respect of the Dolgelly shares.

I think the plaintiff is entitled to recover in respect of the South Burma Tin Mine the sum of 2686*l.* 15*s.* in respect of the fraud which the jury have found, but that the Statute of

Limitations is an answer to the claim for breach of duty as regards this mine; and is entitled to recover in respect of the Dolgelly Tin Mines the sum of 3481*l.* 5*s.*, both on the ground of fraud and breach of duty.

I therefore give judgment for the plaintiff on the claim in respect of the South Burma Tin Mine and the Dolgelly Tin Mines for 6168*l.*, and for the defendant in respect of the claim made by the plaintiff as trustee for Miss Oelkers, and on his claim in respect of the Cove Copper shares.

Judgment for plaintiff.

Solicitors for plaintiff: *Osborn & Osborn.*
Solicitor for defendant: *Walter J. Payne.*

W. H. G.

NORMAN *v.* THE GREAT WESTERN RAILWAY COMPANY.

1913
Dec. 16, 20.

Negligence—Railway Company—Duty towards Invitees—Station Yard—Open Culvert—Horse and Cart unattended—Contributory Negligence.

A railway company occupied a station yard with an approach thereto. The plaintiff was in the habit of going himself or sending his driver to the station yard with a horse and cart to receive or deliver goods. The yard was bounded on one side by a sloping bank at the bottom of which was an open culvert. Both the plaintiff and his driver knew the place well. On the occasion in question the driver drove the horse and cart up to the door of the weighing office. The sloping bank was forty feet behind the cart. He left the horse and cart unattended, as he and other drivers usually did, and went into the office, where he remained for a few minutes. The horse in his absence backed the cart over the bank and was dragged backwards into the culvert and injured.

In an action in the county court against the company for negligence, the jury found a verdict for the plaintiff. The county court judge entered judgment in accordance with the verdict. On appeal:—

Held, per curiam (Bray and Lush JJ.), that the duty of a railway company towards persons resorting to their stations and yards in the ordinary course of business is higher than that of the occupier of private premises towards persons resorting to such premises in the like manner; and that railway companies are bound to take reasonable care to have their premises reasonably safe for persons using them in the ordinary and customary manner and with reasonable care.

Held, per Bray J., that there was evidence of a breach of this duty causing the accident, and that the question of contributory negligence was for the jury.

Held, per Lush J., that there was no evidence of any breach of the duty causing the accident; that the effective cause of the accident was the negligence of the driver in leaving the horse unattended; and that, if this amounted to contributory negligence, the Court ought in the circumstances, notwithstanding the verdict of the jury, to hold that there was contributory negligence.

APPEAL from the county court of Glamorganshire holden at Pontypridd.

The defendants have a station with a station yard or approach thereto at Penygraig. The plaintiff was in the habit of going himself or sending his driver, named Bridges, with a horse and cart to the station yard to receive goods consigned to him or to deliver goods for carriage. The yard was bounded on one side by a sloping bank at the bottom of which there was an open culvert. Both the plaintiff and his driver knew the place well.

On the occasion in question Bridges drove the horse and cart up to the door of the weighing office. The sloping bank was forty feet behind the cart. He left the horse and cart unattended, slung the reins over a lamp at the back of the cart, and went into the office. There he remained according to his own account for two or three minutes, according to the evidence of the defendants for seven or eight minutes. There was some dispute as to whether there were any goods for him, and as to whether he did or did not sign the book: he said he did. When he was about to leave the office he looked out of the window to see to his horse and cart, and he found them gone. Another man in the office heard a noise; they both came out, and found that what had happened was this: The horse being left alone had backed the cart from some unexplained cause until the wheels of the cart got over the bank, and the horse was then dragged backwards with the cart into the culvert. It was very much hurt and had to be destroyed. The action was brought for damages for the loss of the horse, the cause of action being the alleged negligence of the defendants in not fencing the bank at the edge of the yard.

The action was tried with a jury. At the close of the plaintiff's case, counsel for the defendants submitted that there was no case

1913

NORMAN
v.
GREAT
WESTERN
RAILWAY.

to go to the jury. The county court judge left the case to the jury, reserving all rights of argument and discussion. The jury found a verdict for the plaintiff for 37*l.* Thereupon after argument the county court judge considered his judgment and, with some doubt, ultimately gave judgment in accordance with the verdict, although, as he said, it was not a decision which he would have come to himself.

The defendants appealed.

Schiller, K.C., and *W. H. P. Lewis*, for the defendants. This case ought not to have been left to the jury. There was no evidence of negligence. There is no negligence without a breach of duty. The duty of persons in the position of the defendants was finally settled by the decision in *Indermaur* v. *Dames.* (1) The plaintiff here belongs to the class of persons described by Willes J., who delivered the considered judgment of the Court of Exchequer in that case (2), as those " who go upon business which concerns the occupier, and upon his invitation, express or implied. And "—continued the learned judge—" with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact." This judgment was affirmed in the Exchequer Chamber. (3) Subsequent cases have approved but never criticized that decision, e.g., *Stevenson* v. *Glasgow Corporation* (4); *Lowery* v. *Walker* (5); *Morris* v. *Carnarvon County Council* (6); *Latham* v. *R. Johnson & Nephew.* (7) See also Halsbury, Laws of England, vol. xxi., s. 656. Knowledge on the part of the invitor and absence of knowledge on the part of the invitee are generally necessary to a cause of action. In other words, an invitor generally discharges his liability by giving warning of the danger. Therefore where the danger is open and apparent there is generally no negligence; there the invitee has warning. In the rare cases where warning is not sufficient, still it is a condition precedent to any right of action that the invitee should use "reasonable care on his part for his own safety." One who, seeing this bank and culvert, left a horse and cart unattended cannot be said to have used reasonable care for his own safety. The plaintiff was, through his servant, the author of his own wrong.

---

(1) (1866) L. R. 1 C. P. 274; affirmed (1867) L. R. 2 C. P. 311.

(2) L. R. 1 C. P. at p. 288.

(3) L. R. 2 C. P. 311.

(4) 1908 S. C. 1034.

(5) [1910] 1 K. B. 173; on appeal [1911] A. C. 10.

(6) [1910] 1 K. B. 840.

(7) [1913] 1 K. B. 398.

J. Sankey, K.C., and *Harold Morris*, for the respondent. The jury found a general verdict for the plaintiff. That is to say, they have found no contributory negligence on the part of the plaintiff, and they have found negligence on the part of the defendants. This raises the question, What was the duty imposed by law on the defendants? Public bodies carrying on an undertaking by virtue of statutory powers and enjoying in effect a monopoly granted by the Legislature, not exclusively for their own benefit, but partly for the benefit of the public, owe a higher duty than does the occupier of private property towards those who have recourse to their premises in the way of their business. They must take reasonable care to have their premises reasonably safe for all those who use them in the ordinary way and with ordinary care. A railway company is such a body: *Longmore* v. *Great Western Ry. Co.* (1) There a railway company for the convenience of passengers provided a bridge between two platforms. The bridge was defectively constructed. A passenger, who had used the bridge on several previous occasions, was killed by falling from the bridge owing to its defective construction. His widow and administratrix brought an action. The judge at the trial left it to the jury to say whether or not the company had been guilty of negligence in providing a bridge for the use of the public that was not reasonably safe. This direction was upheld by the Court in banc. In *Simkin* v. *London and North Western Ry. Co.* (2) Lopes L.J., delivering the considered judgment of himself and Cotton L.J.,

(1) (1865) 19 C. B. (N.S.) 183; 35 L. J. (C.P.) 135.

(2) (1888) 21 Q. B. D. 453.

said (1): "The duty which the defendants owed the plaintiffs was to provide a reasonably safe mode of leaving their station, having regard to the business they carried on at their station." Fry L.J. said (2): "The railway company were under an obligation to provide means of access to and egress from their station reasonably safe and suited for the carrying on of the business which their Act of Parliament authorized them to carry on." A similar obligation is imposed upon the owners of a cattle market: *Lax* v. *Corporation of Darlington.* (3) In such cases the defendant does not discharge his duty by merely affecting the plaintiff with notice of the danger which, but for the breach of duty on his part, would not exist at all: *Thomas* v. *Quartermaine* (4), per Bowen L.J.

The question whether there was a breach of this duty was for the jury. A station yard may be reasonably safe although bounded by an open culvert; it may be extremely dangerous. The question is essentially one of fact.

The remaining question is whether the plaintiff's driver was guilty of contributory negligence. This again is wholly a question for the jury.

W. H. P. Lewis in reply.

Cur. adv. vult.

Dec. 20. The learned judges differing in opinion, the junior judge delivered his judgment first.

LUSH J. This is an appeal by the defendants from a judgment of the learned county court judge at Pontypridd.

The facts, stated shortly, are these: [The learned judge stated the facts, and continued:] The question is whether, on these practically undisputed facts, there was any liability upon the defendants. The first question argued before us was one of considerable general importance. It was contended by Mr. Schiller and Mr. Wilfrid Lewis for the defendants that the only obligation upon the railway company is not to have a hidden or concealed trap or danger upon their premises. It was said that their position was the ordinary position of the occupiers of premises who invite other persons upon their premises to do business with them. *Indermaur* v. *Dames* (1), the well-known leading case on the subject, was referred to; and two cases, amongst others, were cited which were quite recently decided. The first was *Lowery* v. *Walker* (2), in which Vaughan Williams L.J. in giving judgment said this: "In such cases a duty exists on the part of the person who invites towards a person who acts on the invitation. That duty does not, according to the authorities, amount to a guarantee by the inviter that the person invited shall suffer no injury while on the premises to which he has been invited to come, but only to a duty to take reasonable care that he shall not be exposed to dangers which are more or less hidden, and not obvious. Cases of that kind have been frequently called 'trap' cases."

---

(1) 21 Q. B. D. at p. 457.

(2) Ibid. at p. 459.

(3) (1879) 5 Ex. D. 28.

(4) (1887) 18 Q. B. D. 685, at p. 697.

The other was the case of *Latham* v. *R. Johnson & Nephew* (3), in which Hamilton L.J. said this: "In *Lowery* v. *Walker* in the Court of Appeal (4) — the reversal of which case in the House of Lords does not affect the present point— Buckley L.J. (5) treats the decision as being one upon which the liability 'may arise from the fact that the landowner knows that he is exposing the persons whom he allows to pass over his ground to danger of which he is aware and they are not.'" I need not read further, because these cases are only illustrations of the principle laid down in *Indermaur* v. *Dames*. (1)

I have come to the conclusion that those cases have no application to a case like this. I think that a railway company is under a higher duty than that which the law imposes upon the occupier of private premises. In the case of the latter, the occupier of a shop for example, the duty is created by the invitation; apart from the invitation no duty lies upon the invitor. If the invitee chooses to enter he takes the premises as he finds them, subject only to this, that if the invitor knows of a danger which is not so obvious as to become known to the invitee also, then the invitor must take reasonable means, whether by notice, guarding, lighting, or otherwise, to prevent injury to the invitee arising from the danger. But a railway company, which carries on not merely a private business for its own benefit but an undertaking in which the public are interested and of which they are entitled to avail themselves, is under a duty to the public, not because of any invitation, but apart from invitation, to afford proper and reasonable accommodation to the persons who come to do business with them. Railway companies have a monopoly, and statutory privileges; they come under a corresponding duty to all persons to whom the companies owe and are bound to render their services to take reasonable care to see that their premises are safe. It is unnecessary to refer to cases which have decided that railway companies are, as such, bound to have in a reasonably safe condition their carriages, bridges, ways, and works. I will just refer as an illustration of the duty they are under to the case of *Grote* v. *Chester and Holyhead Ry. Co.* (1), which was commented on and explained in *Francis* v. *Cockrell.* (2) It is impossible to say that while railway companies are under a duty to take care that their stations, for example, are safe, they are under no duty to take care that the approaches to their stations are safe. In my opinion they are under such a duty, not because they invite people, but because they carry on this public business with the duty attached to the calling that they follow: they are under a duty to take reasonable care to see that the premises are safe. I would refer as an authority to the case of *Simkin* v. *London and North Western Ry. Co.* (3), cited to us in the argument. What happened was that a passing train emitted steam and made a great noise, in consequence of which a horse was frightened and ran away. The question was whether the defendants were liable because they did not screen the engine and the steam from the horses in the station yard. The Court of Appeal held they were not, but, in defining what their duty was, both Lopes L.J., who delivered the judgment of himself and Cotton L.J., and also Fry L.J. stated in terms that the duty of the railway company was to provide a reasonably safe

---

(1) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

(2) [1910] 1 K. B. 173, at p. 183; on appeal [1911] A. C. 10.

(3) [1913] 1 K. B. 398, at p. 417.

(4) [1910] 1 K. B. 173.

(5) [1910] 1 K. B. at p. 193.

(1) (1848) 2 Ex. 251.

(2) (1870) L. R. 5 Q. B. 501, at p. 505.

(3) 21 Q. B. D. 453.

mode of leaving their station, having regard to the business that they carried on.

Lax v. *Corporation of Darlington* (1) was cited as an authority for the same proposition. I only mention it to shew that I have not overlooked it. I doubt whether that case is really in point. The question there was as to the duty of a corporation as owners of a cattle market. The judgment seems to have proceeded upon the ground that the market was in the nature of a highway. But apart from that case, for the reasons I have mentioned, I think that the company were under this higher duty. Upon this part of the case I should like to refer to an instructive passage in the 8th edition of Addison on Torts, at p. 717, which I think correctly states the law: "The duty is at its highest in the case of one who exercises a public calling and invites persons to use his property for purposes of his calling. The grant or licence under which he carries on his business is given partly for the benefit of the public, and it is his duty to keep the property in a reasonably safe condition." Then several instances are given, which I think are correctly given and shew that a higher duty attaches to persons carrying on a public business.

Therefore, so far as that ground of appeal goes, I think it is not accurately said that the defendants are free from liability merely because there was no hidden or concealed trap.

Accepting that as their duty, the next question is whether there was evidence of a breach of that duty or of injury in consequence of the breach. In my opinion there was no evidence of a breach of duty, and no evidence that the accident was caused by any breach of duty. What is meant when it is said that the premises must be in a reasonably safe condition? The word safe, like the word dangerous, is a relative term. That which is safe to one person may be dangerous to another. That which is safe to a person in some circumstances may be dangerous to him in other circumstances. In my view the obligation of a railway company is necessarily subject to this limitation, that those who use the company's premises should use them in the ordinary way and with ordinary care. The company are not bound to protect those who use their premises in a way that is

---

(1) 5 Ex. D. 28.

1913

NORMAN
v.
GREAT
WESTERN
RAILWAY.

Lush J.

not usual or not anticipated. If persons so using the premises are not protected from injury, it does not follow that the company are negligent. In the present case I see no evidence that the defendants' yard was unsafe to persons using it in the ordinary way. It is not suggested that there was not ample room for carts to drive up, turn round, and go away. For years the yard had been used as it is now. Numberless carts have used it without accident. This accident would not have happened if the horse and cart had not been left unattended. It is said that drivers were in the habit of leaving their horses and carts unattended. If that be true it goes far to shew that this yard was generally regarded as requiring no further precaution for the safety of those who used it. I cannot think that the railway company are bound to take more care of horses and carts than their owners generally do. The remarks of Lopes L.J. in *Simkin* v. *London and North Western Ry. Co.* (1) apply with much force. The Lord Justice said: "There was no suggestion that any accident had ever been caused by the insufficiency of this paling or screen. No person was called to say it was improper or insufficient. There was no evidence of its being improper or insufficient beyond the paling itself." In my opinion it is not reasonable to demand of the person who laid out this yard such prescience as would enable him to foresee that a horse and cart might be left unattended and that the horse might run away. If the company were bound to provide against this I can see no limit to their obligation.

The last point is this: in my view the accident was caused by the act of the plaintiff's own driver, and it is not true to say that it was caused by any act or omission of the defendants. Their duty is not higher than that of the owners of a cattle market, in which case, to quote the words of Brett L.J. in *Lax* v. *Corporation of Darlington* (2), "If the plaintiffs themselves were guilty of an unreasonable want of care in the mode in which they put their cattle into the place destined for them, or if the plaintiffs wilfully and purposely undertook a risk and danger which was fully known to them, under those circumstances, notwithstanding the primary liability of the defendants, it would be right in point of law to say the plaintiffs had contributed to the loss, or that they were the sole cause of the damage to their cow." Even in the case where the duty is highest, that of a defendant in charge of an animal feræ naturæ who is liable as an insurer, the same principle has been held to apply. If the plaintiff has brought the accident upon himself, he cannot hold the defendants liable: *Marlor* v. *Ball* (1), citing *Filburn* v. *People's Palace and Aquarium Co.* (2) If, as I think, the plaintiff's act really brought about this loss, I do not shrink from the conclusion, if it be the necessary conclusion, that the plaintiff's driver was guilty of contributory negligence; for I still think that it is open to this Court to find contributory negligence in a proper case notwithstanding that the jury have negatived it. In *Dublin, Wicklow and Wexford Ry. Co.* v. *Slattery* (3) the House of Lords held that the Court ought to take this course if upon the undisputed facts the contributory negligence plainly appears. In the present case I think it does so appear. In *Engelhart* v. *Farrant* (4) Lopes L.J. expressed the view that if a person chooses to leave a horse and cart unattended in a street he takes upon himself the risk of what follows. In leaving the horse and cart where he did, in view of the slope which he well knew, the plaintiff's driver, and consequently the plaintiff himself, took the risk of what followed, and the company cannot, in my opinion, be held responsible because the horse backed.

---

(1) 21 Q. B. D. 453, at p. 457.

(2) 5 Ex. D. 28, at p. 33.

For these reasons I think that judgment ought to be entered for the defendants.

Bray J. read the following judgment:—This is a claim for damages for injury to the plaintiff's horse and cart through its falling down a slope at the defendants' station, which was alleged by the plaintiff to have been negligently left unfenced. The jury found for the plaintiff, damages 37*l*. The judge entered judgment for the plaintiff, after argument as to whether there was evidence to support the finding of the jury. The defendants now appeal on the ground that there was no evidence, and misdirection.

(1) (1900) 16 Times L. R. 239.

(2) (1890) 25 Q. B. D. 258.

(3) (1878) 3 App. Cas. 1155.

(4) [1897] 1 Q. B. 240, at p. 245.

The facts are these: The defendants have a goods yard adjoining the Penygraig station and an approach road thereto. The plaintiff was consignee of goods which had arrived at the station by rail; he sent his carter, Bridges, with a horse and cart to fetch them. Bridges went and received the goods and put them in his cart and then, according to the usual course, went to the weigh office of the defendants, which was on the approach road, to sign for having received the goods. As was customary he left his horse and cart unattended close to the office while he went in to sign. When inside the office, looking through the window, he missed the horse, heard a crash, and went out and found that the horse and cart had fallen down the slope which was forty feet behind the cart. The horse had to be killed, and other damage was sustained. The slope formed one of the sides of the approach road and was entirely unfenced and unprotected. The fact that the slope was unfenced was known both to the plaintiff and Bridges, from their use of the approach road.

On these facts two contentions were made on behalf of the defendants—first, that there was no evidence of negligence, or that the accident was not caused by any negligence; second, that the duty of the defendants was no more than that of the defendant in *Indermaur* v. *Dames* (1), i.e., that of using reasonable care to prevent damage to the plaintiff from unusual danger or of warning the plaintiff of the unusual danger, and that the judge misdirected the jury in not directing them that that was the only duty. Counsel were not able to tell us exactly what the direction was, but I think it must be taken that the judge did not direct the jury in the manner contended for by the defendants.

It must, therefore, be considered: What was the duty of the railway company to a person in the position of the plaintiff? In my opinion both on reason and on authority the duty of the defendants was larger; it was at least a duty to take reasonable care that their premises were reasonably safe for persons using them in the ordinary and customary manner and with reasonable care. I am inclined to think that there was no warranty that the premises were reasonably safe, but that the defendants were only under an obligation to take reasonable care that they should be so, but it is not necessary to decide this question because, if by reason of the slope being unfenced the premises were not reasonably safe, the defendants had done nothing to make them safe and had entirely neglected to fence them.

---

(1) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

The defendants have powers and privileges conferred on them by statute and they act as common carriers of goods. They are bound to carry and deliver goods brought to them, and if the place at which they offer delivery is their station yard they are, in my opinion, bound to take reasonable care to make that yard and the approach thereto a reasonably safe place. Their obligation is not confined to carrying the goods, it includes delivery and delivery at a reasonably safe place, just as their obligation to carry passengers is not confined to carrying them, but extends to taking care that their stations and platforms and the means of access to such stations and platforms are reasonably safe. That I think is settled law. It was in principle so decided in the House of Lords in *London, Tilbury and Southend Ry. Co.* v. *Paterson.* (1) The rule was well expressed in *Simkin* v. *London and North Western Ry. Co.* (2) Lopes L.J., in delivering the considered judgment of himself and Cotton L.J., said the duty which the defendants owed the plaintiffs (who were passengers that had arrived by train) was to provide a reasonably safe mode of leaving their station, having regard to the business they carried on at their station. Fry L.J. expressed the duty in very similar language (3): "The railway company were under an obligation to provide means of access to and egress from their station reasonably safe and suited for the carrying on of the business which their Act of Parliament authorized them to carry on. The question in this case is whether it was reasonably safe." In *Longmore* v. *Great Western Ry. Co.* (4) the decision was to the same effect. The defendants were held liable for not fencing some steps to a bridge used by passengers for crossing the railway, although the deceased had many times, as also many thousand passengers had, crossed the bridge before in perfect safety. The same principle was laid down by the Court as to the liability of the owners of a market in *Lax* v. *Corporation of Darlington* (1), where Brett L.J. said: "I cannot doubt myself upon the most ordinary principles of law, that inasmuch as they receive payment for that standing, they are prima facie under the liability of affording a place which is not dangerous for the purposes for which the payment is made." It is not, in my opinion, correct to say that if there is no "trap" or no unusual danger there can be no liability, and no authority was cited to us to that effect.

---

(1) (1913) 29 Times L. R. 413.

(2) 21 Q. B. D. 453, at p. 457.

(3) Ibid. at p. 459.

(4) 19 C. B. (N.S.) 183.

The next point is whether there was evidence of negligence and that the accident was caused by such negligence.

The case is put thus by the plaintiff: The existence of the unfenced slope in close proximity to the office was dangerous. The practice was for the carter to leave his horse and cart unattended there while he went in to sign. There was plenty of evidence that this practice must have been well known to the defendants. It must, therefore, be taken as having been found by the jury that this was part of the ordinary use of the road, and the obligation of the defendants must have regard to this fact. I think this contention is sound. Then, was it reasonably safe, or was it dangerous? That seems to me to be entirely a question for the jury. If the slope was a few feet away from where the cart stood, I think it could not be denied that it was dangerous. Some sudden noise or other cause may at any time cause a horse, however quiet, to be frightened and to back. Can it be said that a backing of a few feet might be contemplated but not forty feet? Whose province is it to decide this? I think it is the province of the jury. The question often arises when a passenger crossing a railway, in the absence of a bridge, to the platform from which he has to go, is knocked down by a passing train. There is a building or bridge which obstructs the view, and a coming train can only be seen for fifty or one hundred or two hundred yards. In my experience it is always left to the jury to say whether the obstruction makes the crossing sufficiently dangerous to require the railway company to take some precautions to prevent such accidents. I can recollect a case, not reported I think,—I believe it was on the Southport Railway—where the distance was very considerable, but the jury found that it was dangerous, and the Court of Appeal said it was for the jury. In my opinion the county court judge was bound to leave the question here to the jury.

---

(1) 5 Ex. D. 28, at p. 33.

Then it was said that there was no evidence that the accident was caused by the negligence and that it was a case of volenti non fit injuria. As regards the first of these points, it was the fact that an accident of this kind might take place that rendered the unfenced slope a danger. If the slope had been fenced, or if there had been no slope, the accident would not have taken place. It was to prevent such an accident that the fencing was needed. The danger arising from the unfenced slope was the cause of the accident, or at all events the jury might so find, as they in fact did, when they gave a general verdict for the plaintiff. The question of volenti non fit injuria is dealt with at great length in the House of Lords in *Smith* v. *Baker*.(1) It was there held that this question was one of fact, not law, and that in order to bring a case within the maxim it must appear that the plaintiff fully appreciated the danger and voluntarily took the risk upon himself. It is true that that was a case of master and servant, but Lord Halsbury L.C. said with reference to this (2): "For this purpose, and in order to test this proposition, we have nothing to do with the relation of employer and employed. The maxim in its application in the law is not so limited; but where it applies, it applies equally to a stranger as to any one else." In *Lax* v. *Corporation of Darlington* (3), already referred to, Brett L.J. said: "I do not doubt that although the defendants are primarily liable as I have stated, yet if the plaintiffs themselves were guilty of an unreasonable want of care in the mode in which they put their cattle into the place destined for them, or if the plaintiffs wilfully and purposely undertook a risk and danger which was fully known to them, under those circumstances, notwithstanding the primary liability of the defendants, it would be right in point of law to say the plaintiffs had contributed to the loss, or that they were the sole cause of the damage to their cow." What real

(1) [1891] A. C. 325.

(2) [1891] A. C. at p. 337.

(3) 5 Ex. D. 28, at p. 33.

choice has a consignee of goods in such a case as this? The railway is practically his only means of getting his goods and he is bound to fetch them away, and without delay, or he will be charged demurrage. He is as much obliged to send his horse and cart for his goods as the passenger is obliged to cross the railway to get into his train. Unless the jury find the practice was negligent he is no more bound to send a second man with the cart than a passenger is bound to take a companion to keep watch to see whether a train is coming. It is not really practicable. The company were well aware that consignees took no such precautions, but whether it be so or not is for the jury and not for the judge, and no absence of a direction or misdirection of the judge on this point was complained of in the notice of appeal, or, I gather, at the trial. So far as this is a question of contributory negligence the jury have negatived it. It is admitted that the question of contributory negligence was properly left to them. This case may be near the line and the judge might well have said, as he did say, that he would not have given the same verdict, but if there was evidence to support the verdict of the jury this Court has no power to interfere. The jury have found on sufficient evidence that there was a primary liability, as Brett L.J. called it, on the part of the defendants, and have not found that the plaintiff wilfully and purposely undertook the risk or that Bridges was guilty of contributory negligence. In my opinion, the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellants: *L. B. Page.*

Solicitors for respondent: *Smith, Rundell & Dods, for Morgan, Bruce, Nicholas & Jenkins, Pontypridd.*

W. H. G.

1913
Dec. 3, 4.

FULLER *v.* GLYN, MILLS, CURRIE & CO.

[1913 F. 361.]

Banker—Deposit of Securities by Broker—Authority of Broker to pledge—Estoppel—Purchase for Value in Good Faith.

The plaintiff had bought through a firm of stockbrokers certain shares of which one H. was the registered holder. Upon the certificates for the shares was indorsed a form of transfer which had been executed by H. The plaintiff allowed the certificates to remain in the hands of the stockbrokers in this condition. The stockbrokers proposed and the plaintiff agreed that the shares should be registered in names other than his own name. Before this was done they deposited the certificates with the defendants, their bankers, as security for their account with the defendants, requesting the defendants to have the shares registered and certificates made out in the names of two nominees of the defendants. This was done. The stockbrokers then became bankrupt, owing a large sum to the defendants. The plaintiff claimed the certificates. The defendants asserted the right to hold them as bona fide pledgees without notice of the plaintiff's title:—

Held, (1.) on the facts, that there was nothing to put the defendants upon inquiry as to the extent of the stockbrokers' authority to pledge the certificates.

London Joint Stock Bank v. *Simmons* [1892] A. C. 201 followed.

Held, (2.) that the plaintiff was estopped from setting up his title as against the defendants, having left the certificates in the hands of the stockbrokers in such a condition as to convey a representation to any person who took them from the stockbrokers that they had authority to deal with them.

Colonial Bank v. *Cady* (1890) 15 App. Cas. 267 applied.

TRIAL of action before Pickford J. without a jury.

The action was brought to recover a number of certificates for shares of stock in the Canadian Pacific Railway Company belonging to the plaintiff which had been deposited with the defendants in the circumstances related below. As to a large number of these certificates the defendants admitted that they could not hold them as against the plaintiff; as to others the plaintiff admitted that he could not establish his title. The question in the case was as to eleven certificates for 110 shares in all purchased by the plaintiff between September 19 and November 5, 1907.

The plaintiff had been introduced to a firm of stockbrokers, Messrs. Inchbald & Son, members of the Stock Exchange and of good repute. Through them he bought shares for investment, the business which he did with them not being in any way a speculative business. Among a large number of other shares he bought from them the 110 shares of $100 each, the certificates relating to which were in question.

The certificates were in the following form:—

"Common Stock.

"10 shares 10 shares.
"No. Shares $100 each.

"The Canadian Pacific Railway Company.
"Dominion of Canada.

"This certifies that is the owner of ten paid up shares of the capital stock of the Canadian Pacific Railway Company of one hundred dollars each transferable only on the books of the company in person or by attorney and upon the surrender of this certificate.

"This certificate shall not become valid until countersigned by the transfer agent and also by the registrar of transfers.

"In testimony whereof the said company has caused this certificate to be signed by its president and secretary this day of ."

Then followed the signatures of the several officials of the company. Each certificate bore a form of transfer indorsed upon it as follows:—

"For value received have bargained, sold, assigned, and transferred and by these presents do bargain, sell, assign and transfer unto shares of the capital stock of the Canadian Pacific Railway Company mentioned in the within certificate, and do hereby constitute and appoint true and lawful attorney irrevocable for and in name and stead to use to sell, assign, transfer and set over all or any part of the said stock and for that purpose to make and execute all necessary acts of assignment and transfer and one or more persons to substitute with like full power.

"Dated

"Signed and acknowledged in presence of

"Mem.—The witness must state his address and occupation.

The company reserves the right of requiring further identification of the transferor's signature."

In the margin of this indorsement was the following :—

"Notice.—The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular without alteration or enlargement, or any change whatever."

The shares of stock represented by these certificates were registered in the name of H. J. Harmsworth. The certificates were in his name and the forms of transfer were signed by him. The certificates came into the hands of the stockbrokers in this condition. The plaintiff asked that the shares should be transferred into his own name, but was told by the stockbrokers that this was not the usual course to adopt on account of the delay, expense, and risk of loss in transit if the certificates were sent to Canada. He was thus persuaded to leave the certificates in the hands of the stockbrokers.

Shortly afterwards the stockbrokers told the plaintiff that the name in which these shares stood must be changed and that they must be taken out of the name of H. J. Harmsworth and put into other names, the reason given being probably the true one, namely, that the dividends were being sent to Harmsworth as the registered owner, that claims had been made upon him by those entitled to the dividends, and that he declined to be further concerned with them. The plaintiff again asked that the shares should be registered in his own name. The only explanation he gave why this was not done was that the stockbrokers put him off. Ultimately he consented to their being registered in names other than his own. The plaintiff knew that the transfer from the name of Harmsworth into the names of other persons could be effected without any act of his.

On September 24, 1908, the stockbrokers deposited the certificates with the defendants, who were their bankers, as security for fortnightly loans made by the defendants to the stockbrokers in the account between them. At the same time they requested the defendants to have the shares registered in the names of two nominees of the defendants. The defendants agreed to do this for the convenience of the stockbrokers in the view that it would facilitate the collection of dividends. The shares were ultimately registered and certificates were made out in the names of the defendants' nominees. They remained in the hands of the defendants as above described until the bankruptcy of the stockbrokers and their conviction for fraud and forgery.

The plaintiff claimed to recover these certificates.

The defendants claimed the right to retain them as they had taken them bona fide and for value from the stockbrokers, and pleaded that the plaintiff was estopped from setting up his title as against them.

Disturnal, K.C., and *Hon. M. Macnaghten*, for the plaintiff. Certificates with a form of transfer indorsed upon them executed by the registered owner may pass from hand to hand on the Stock Exchange, but they are not negotiable instruments. The stockbrokers, Messrs. Inchbald, being in possession of the plaintiff's certificates for safe custody, when they exceeded their authority and pledged them with the defendants, were guilty of a conversion, and, as the certificates were not negotiable instruments, it follows that the defendants who took them from the stockbrokers were also guilty of conversion.

The transfer of these instruments does not transfer the right to the shares they represent; it transfers a right to be registered; not necessarily the full right, but just such a right as the transferor had to be registered as the owner of the shares. What right had the stockbrokers to be registered as owners of these shares? None, except as trustees for the plaintiff. The defendants took the same and no greater right; and they did not improve their position by filling up the blanks in the form of transfer and having themselves registered: *France* v. *Clark*. (1)

The good faith of the defendants and their alleged absence of knowledge of the plaintiff's title do not avail them unless there was some act or omission on the part of the plaintiff estopping him from asserting his title. There has been no such act or omission. He never executed any transfer. He left the certificates with his brokers in the names of the defendants to facilitate collection of dividends. That was quite a reasonable and proper course to take. It is less than was done by the executors in *Colonial Bank* v. *Cady* (1), yet they were held not to be estopped. The defendants cannot say that they took these certificates without knowledge of facts which should have put them on inquiry as to the extent of the stockbrokers' authority to pledge them. Whether such knowledge exists in the minds of bankers who take deposits en bloc of securities from stockbrokers is a question of fact in each case: *Earl of Sheffield* v. *London Joint Stock Bank* (2); *London Joint Stock Bank* v. *Simmons.* (3) It is hard to believe that bankers have no suspicion as to the ownership of securities deposited by stockbrokers, or that they really think the stockbrokers have authority to pledge their customers' property as security for their own overdrafts. The fact that bankers habitually release securities in exchange for others shews their knowledge of the true position. Why should they be ready to do this if the original securities were in fact the property of the stockbrokers? "If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him and puts the suspicions aside without further inquiry": per Lord Herschell, *London Joint Stock Bank* v. *Simmons.* (4) The truth is that bankers are well aware of this practice of stockbrokers in so dealing with securities of their customers; and if they were not originally aware of it the cases of *Earl of Sheffield* v. *London Joint Stock Bank* (2) and *London Joint Stock Bank* v. *Simmons* (3) must have supplied the necessary information. The plaintiff is therefore not estopped from setting up his title, and is entitled to recover.

---

(1) (1884) 26 Ch. D. 257.

Younger, K.C., *A. H. Chaytor*, and *Alexander Cross*, for the defendants. This case is concluded by authority in favour of the defendants. The position of persons who take certificates with tranfers indorsed upon them executed in blank has been declared by Lord Watson in *Colonial Bank* v. *Cady* (5) in these words: "Delivery passes, not the property in the shares, but a title, legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner." The plaintiff in the present case derives title through H. J. Harmsworth, who was, at the time when the defendants took these certificates, the registered owner of the shares. It follows that the plaintiff cannot defeat the right of the defendants. Passages to the same effect as that just cited from Lord Watson's judgment occur in the opinions of Lord Halsbury L.C. and Lord Herschell. The position of a holder of such certificates was again stated clearly and accurately in *Stern* v. *Reg.* (1)

---

(1) 15 App. Cas. 267.

(2) (1888) 13 App. Cas. 333.

(3) [1892] A. C. 201.

(4) Ibid. at p. 221.

(5) 15 App. Cas. 267, at p. 277.

Since the decisions in *London Joint Stock Bank* v. *Simmons* (2) and *Bentinck* v. *London Joint Stock Bank* (3) it cannot be said that the mere fact that a stockbroker offers to deposit with a banker a block of securities as cover for a loan account is any notice whatever to the banker that the broker has no title, or less than a full title, to the securities. The plaintiff must go further than that; he must point to some definite fact which would put a reasonable business man upon inquiry. Nothing of the kind is shewn here. The facts tend to the opposite conclusion, namely, that the stockbrokers had the full title to the shares. The plaintiff left the certificates in the hands of the stockbrokers in such a condition that the stockbrokers could deal with them even to the extent of having the defendants registered as the owners, and that the certificates themselves contained a representation to any person who took them that the stockbrokers had authority to deal with them; and he gave no notice to any person dealing with the stockbrokers that there was any limit to their authority. That being so, the plaintiff cannot dispute the stockbrokers' authority: *Fry* v. *Smellie*. (4)

Macnaghten in reply.

Pickford J., after stating the facts as above, gave judgment as follows: The first question I have to consider is whether the defendants took the shares in good faith. I cannot see that they did otherwise. The broad question whether bankers are put upon inquiry by the mere fact that a stockbroker brings them securities in various names and deposits them en bloc as security for his general account I need not consider, because that point has been decided by the House of Lords in *London Joint Stock Bank* v. *Simmons.* (1) Lord Halsbury L.C. there said (2): "The inferences derived from the business carried on by the money-lender in *Lord Sheffield's Case* (3) were peculiar to that case, and have no relation to the course of business which brokers habitually pursue towards their own clients, and for their own clients, when dealing with bankers with whom they deposit securities. The deposit of securities as 'cover' in a broker's business is as well-known a course of dealing as anything can possibly be, and the phrase that they are deposited en bloc seems to me to be somewhat fallacious. That they are, in fact, deposited by the broker at one time, and to raise one sum, may be true. It does not follow, and I do not know, that the banker could reasonably be expected to presume that they belonged to different customers, and that the limit of the broker's authority was applied to each individual security by his own client." Passages to the same effect have been cited from other cases which establish that the mere fact that a broker brings a block of securities and pledges them with a banker against his general account, and allows them to remain as security for a considerable time, is not sufficient to put the banker upon inquiry.

---

(1) [1896] 1 Q. B. 211.

(2) [1892] A. C. 201.

(3) [1893] 2 Ch. 120.

(4) [1912] 3 K. B. 282.

It was contended that the fact of the transfer from the name of Harmsworth into the names of nominees of the defendants was not a dealing in the ordinary course of business and ought to have affected the defendants with notice that the shares were not Messrs. Inchbald's shares. I do not feel much pressed by that contention. The fact that the shares were not in Messrs. Inchbald's name did not shew that they were not Messrs. Inchbald's shares. The plaintiff had in fact put the shares into the power of Messrs. Inchbald. The defendants were probably told that the shares were to be registered in the names of their nominees in order to facilitate the collection of dividends.

If they took the shares in good faith and without notice of the plaintiff's title, I think the case is concluded by authority. It is

(1) [1892] A. C. 201.

(2) Ibid. at p. 211.

(3) 13 App. Cas. 333.

true that the exact point has not been decided, but in *Colonial Bank* v. *Cady* (1) the House of Lords distinctly held that if the testator in that case, John Michael Williams, had executed a transfer of the shares and left them in the hands of the brokers, he would have been estopped from denying the title of any one who took them from the brokers in good faith and for value. The same doctrine which would apply to the shares in that case would apply to those in the present case. The act of signing the form of transfer on the back of the certificate does not make that document a negotiable instrument in the strict sense, but any one who signs the transfer and then hands the document to another person knows that he is putting into the power and disposition of that person a document which carries with it an apparent authority to that person to deal with it. Does the principle of *Colonial Bank* v. *Cady* (1) cover the present case? If an owner, who has not actually signed the transfer with his own hand, allows his brokers to be and continue in possession of the certificate, which he knows is transferable without any act on his part, is he estopped from disputing the title of one who in good faith takes the document as transferee from the brokers? The defendants contend that this question is concluded by three passages from *Colonial Bank* v. *Cady.* (1) The first is from the judgment of Lord Watson (2), who said, "The appellant's witnesses say that delivery of the certificate, with the transfer executed in blank, 'passes the property' of the shares; but that statement must be accepted subject to the explanations by which it is qualified. The right of the holder appears from these explanations to be in the nature of a jus ad rem and not of a jus in re. Delivery does not invest him with the ownership of the shares in the sense that no further act is required in order to perfect his right. Notwithstanding his having parted with the certificate and transfer, the original transferor, who is entered as owner in the certificate and register, continues to be the only shareholder recognized by the company as entitled to vote and draw dividends in respect of the shares, until the transferee or holder for the time being obtains registration in his own name. It would, therefore, be more accurate to say that such delivery

---

(1) 15 App. Cas. 267.

(2) Ibid. at p. 277.

1913

FULLER
v.
GLYN, MILLS,
CURRIE & Co.

Pickford J.

passes, not the property in the shares, but a title, legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner." It is said that the plaintiff in the present case derives title from the registered owner and therefore comes within that passage. I am not satisfied that Lord Watson had in mind a case like the present. He was considering a case where the registered owner had executed the form of transfer in blank; when he has done that neither he nor his executors or assigns, the persons whom Lord Watson describes as "deriving title from the registered owner," can dispute the title of a person who in good faith takes the certificate with the executed transfer. The second passage is from the opinion of Lord Halsbury L.C., who said (1), "Kekewich J. then goes on to say that 'the executors are precluded from asserting that Messrs. Thomas were not by the custody of these documents authorized to deal with them, as they from time to time considered desirable.' If this means the mere custody apart from what the instrument upon the face of it represented to any person to whom it might be exhibited, I am wholly unable to assent to any such proposition. But if it means that the document itself in the condition in which it was entrusted to Blakeway represented by its being in that condition that Blakeway was entitled to deal with it, then the decision of the learned judge becomes intelligible, but only upon the ground (which he nevertheless himself disclaims) that the executors made or permitted to be made a representation that Blakeway had full dominion over the certificates to do what he pleased with them, and which representation having been made, the executors are estopped from denying." I am not convinced that Lord Halsbury L.C. was, any more than Lord Watson, contemplating the present case. The third passage is from the judgment of Lord Herschell. (2) "If"—said his Lordship—"the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting his title as against a person to whom such third party has disposed of it, and who received it in good faith and for value." His Lordship does not seem to be contemplating a case like the present, because he goes on: "And this doctrine has been held by the Court of Appeals of the State of New York to be applicable to the case of certificates of shares, with the blank transfer and power of attorney signed by the registered owner, handed by him to a broker who fraudulently or in excess of his authority sells or pledges them." He seems to have in view the case of a registered owner signing a transfer. In short the point in the present case has not been expressly decided. I must therefore consider the principle on which this estoppel rests. In my view it does not rest on the mere manual act of signature. That act is not an essential element in the estoppel. Its importance, where it exists, is as one step towards placing in the power and disposition of another an instrument which carries with it a representation of authority to that other person to deal with it, and which when produced to a third person will convey to that third person that such an authority exists. If that be the principle I see no difference between the case where the owner signs and hands to a broker and leaves in his hands a document so signed, and the case where the holder of a document signed by the registered owner puts it into the hands of his broker, or the case (which is this case) where the true owner, never having had possession of the document, but knowing it to be in such a condition that the broker can deal with it, allows it to remain in the broker's possession and thereby enables the broker to part with it to another who takes it on the faith of the apparent authority of the broker to deal with it. In my view the plaintiff, though he did not actually sign the transfer himself, gave rise to just the same mischief as if he had affixed his signature himself. The present case is therefore covered by the principle of the cases I have mentioned, and there must be judgment for the defendants.

---

(1) 15 App. Cas. at p. 273.

(2) Ibid. at p. 285.

Judgment for defendants.

Solicitors for plaintiff: *James Mellor & Coleman, for J. E. Pink & Marston, Portsmouth.*

Solicitors for defendants: *Bircham & Co.*

W. H. G.

1914
Feb. 4.

PROCTER AND ANOTHER *v.* TARRY AND ANOTHER.

Licensing Acts—Lease—Increase of Licence Duty—Increased Rent due to Licence—Proportion of Increase in Duty recoverable from Lessor—Finance Act, 1912 (2 *&* 3 *Geo.* 5, *c.* 8), *s.* 2.

Sect. 2 of the Finance Act, 1912, provides that in the case of licensed premises which are not "tied," and which are held under a lease made before the Finance (1909-10) Act, 1910, the lessee shall be entitled to recover from the lessor so much of the increase in licence duty payable under the Act of 1910 as is "proportionate to any increased rent . . . . payable in respect of the premises being let as licensed premises":—

Held, that, in order to ascertain for the purposes of the above section whether any increased rent is payable in respect of premises being let as licensed premises, the question to be considered is, what rent could be obtained for the premises as they stand but without a licence, and that it is not material to inquire what rent might be obtained if as a result of extensive structural alterations the licensed premises were converted into premises of a totally different character.

APPEAL from the county court of Warwickshire holden at Warwick.

The plaintiffs were the lessees of fully licensed premises known as the Bath Hotel at Leamington, which was a small old-fashioned hotel with a bowling green adjoining, under an indenture of lease dated March 25, 1907, for a term of fourteen years from that date. The defendants were the executors of the lessor and were entitled to receive the rent. The lease did not contain any covenant, agreement, or undertaking on the part of the lessees to obtain a supply of intoxicating liquor from the grantor of the lease. The annual rent reserved by the lease was 390*l.* Before the passing of the Finance (1909-10) Act, 1910, the duty payable in respect of the licence of the Bath Hotel was 45*l.* per annum. Since the passing of that Act the duty had been increased to 166*l.* per annum.

The plaintiffs claimed under s. 2 of the Finance Act, 1912 (1), to recover 46*l.* 10*s.* 9*d.*, as being so much of the increase of the duty payable in respect of the licence as was proportionate to the increased rent payable in respect of the premises being let as licensed premises.

---

(1) Finance Act, 1912 (2 & 3 Geo. 5, c. 8), s. 2: "Where the licensed premises are held under a lease or agreement for a lease made before the passing of the Finance (1909-10) Act, 1910, which does not contain or import any covenant, agreement, or undertaking on the part of the lessee under such lease or agreement for lease to obtain a

Evidence was given on behalf of the plaintiffs, and the county court judge found as a fact, that the premises as they stood could, if unlicensed, be let as a private hotel or boarding-house for 240*l.* a year; and the plaintiffs' contention was put in the form of a rule of three sum as follows: As 390*l.* (the rent reserved by the lease) is to 150*l.* (the difference between 390*l.* and 240*l.*) so is 121*l.* (the difference between 45*l.* and 166*l.*) to 46*l.* 10*s.* 9*d.*, the sum which the plaintiffs claimed to recover.

The defendants contended that no increased rent was payable in respect of the premises being let as licensed premises, and in support of this contention they adduced evidence to prove that if a sum of about 2750*l.* was expended in converting the hotel into shops and in building shops upon that part of the premises which was used as a bowling green, after allowing 5 per cent. per annum for interest on the capital expenditure, a net annual rental of about 500*l.* could be obtained from the shops.

The county court judge, without finding as a fact whether the defendants' allegations had been proved, held that under s. 2 he had not to determine what the annual value of the premises might be if dealt with in the manner suggested by the defendants, but that the material question was, what was the difference between the rent payable under the lease in respect of the premises and the

---

supply of intoxicating liquor from the grantor of the lease or agreement for lease, the lessee under such lease or agreement for lease shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from, or deduct from any sum due to, the grantor of such lease or agreement for lease so much of any increase of the duty payable in respect of the licence under the provisions of the Finance (1909-10) Act, 1910, as may be agreed upon as proportionate to any increased rent or premium payable in respect of the premises being let as licensed premises, and, in default of agreement, the amount proportionate to such increased rent or premium shall be determined in manner directed by rules of court by a county court in England or Ireland, and by a sheriff court in Scotland. The words 'lease,' 'leased,' 'agreement for lease,' and 'lessee' in this section include sub-lease, sub-leased, agreement for sub-lease, and sub-lessee, respectively."

rent which those same premises would command if the licence was taken away; and he gave judgment for the plaintiffs for the amount claimed.

The defendants appealed.

Disney, for the defendants. The question which has to be determined in order to arrive at the sum payable to the lessee under s. 2 of the Finance Act, 1912, is how much, if at all, is the rent of the premises increased by the fact that they are licensed. The county court judge has proceeded on the principle that for the purpose of applying the section the premises must be taken as they stand without any alteration. That is erroneous. In order to ascertain what rent would be obtainable for the premises if they were not licensed one must assume that the owner will deal with them in such a way as to make them most profitable to himself, and that, in order to achieve that end, he will, if necessary, incur a large capital expenditure for the purpose of making the requisite structural alterations. In *Inland Revenue Commissioners* v. *Truman, Hanbury, Buxton & Co.* (1) the same question arose under s. 44, sub-s. 2, of the Finance (1909-10) Act, 1910, and Lord Atkinson said that the value of premises if unlicensed is to be ascertained " by estimating what the hypothetical tenant would give to possess and enjoy them with all their capacities and possibilities in their unlicensed state, including in that their fitness for carrying on in them a trade other than the trade in intoxicants." That clearly shews that the possibility of structural alterations of a substantial character, such as the defendants' witnesses have suggested, is a matter which must be taken into consideration in determining what rent the premises if unlicensed could be let for. The question must be one of fact in each case to be decided on the evidence of surveyors and other persons competent to form an opinion. The evidence of the defendants' witnesses shewed that in the circumstances of this case the premises could be dealt with in such a manner that, if the licence were taken away, they would produce a higher rent than that reserved by the lease, but the county court judge declined to take that evidence into consideration. There ought, therefore, to

(1) [1913] A. C. 650, at p. 673.

be a new trial. [He referred to *Ashby's Cobham Brewery Co.'s Case.*(1)]

Wootten, for the plaintiffs, was not called upon.

Ridley J. This case has been very well argued by Mr. Disney for the defendants, but I am of opinion that the county court judge came to a right conclusion. The question arises under s. 2 of the Finance Act, 1912. [The learned judge read the section and continued :] It is conceded that, in order to ascertain whether any and what sum is payable to the lessee under that section, one must do a proportion sum in which the first figure is the rent reserved by the lease, the second is so much of that rent as is payable in respect of the premises being let as licensed premises, and the third is the increase in the licence duty. If these three figures have been ascertained, then the fourth figure will be the sum recoverable by the lessee. There can of course be no question as to the first and third figures; the figure in dispute will always be the second. Evidence was given at the trial on behalf of the plaintiffs, and the county court judge has found as a fact, that these premises as they stand but without a licence could be let for 240*l.* a year, that is, 150*l.* less than the rent reserved by the lease. On behalf of the defendants it is contended that there was evidence, which the county court judge ought to have considered, that these licensed premises would if unlicensed be worth more than they are with the licence. It was said that by means of a capital expenditure the premises could be converted into shops, which after allowing for interest on capital would produce a net annual rental of about 500*l.* I think that when one is dealing with the question which arises under s. 2 one is not entitled to embark upon a speculative inquiry of that sort. Sect. 2 speaks of the increased rent payable in respect of "the premises" being let as licensed premises, and that shews, I think, that the section was intended to deal with the premises as they stood, and that one has not to consider what would be the value of some other premises which might be erected on the site if the licensed premises were removed. It is no doubt true that in nearly every case some alteration would necessarily have

(1) [1906] 2 K. B. 754.

to be made before licensed premises could be let if the licence were taken away, and it may be difficult to say exactly where the line is to be drawn. In *Inland Revenue Commissioners* v. *Truman, Hanbury, Buxton & Co.* (1), in the House of Lords, an attempt was made to draw the line. That case was decided on s. 44, sub-s. 2, of the Finance (1909-10) Act, 1910, which provides that "the annual licence value shall be taken to be the amount by which the annual value of the premises as licensed premises exceeds the annual value which the premises would bear if they were not licensed," and Lord Atkinson said (2): "The value of the same premises if unlicensed is, I presume, to be ascertained by the same method, namely, by estimating what the hypothetical tenant would give to possess and enjoy them with all their capacities and possibilities in their unlicensed state, including in that their fitness for carrying on in them a trade other than the trade in intoxicants." Mr. Disney relied on that passage in support of his argument, but I do not think it helps him, for Lord Atkinson expressly speaks of the value of "the same premises" if unlicensed, thus shewing that the premises, the unlicensed value of which is to be ascertained, are to be the same premises as those which were licensed, and not some other hypothetical premises which might or might not come into existence at some future time. In my opinion it is only by taking the licensed premises as they are that one can arrive at the sum which the lessee is entitled to recover under s. 2 of the Act of 1912. For these reasons I am of opinion that this appeal must be dismissed.

ROWLATT J. I am of the same opinion. For the purpose of applying s. 2 of the Finance Act, 1912, it has to be ascertained whether there is "any increased rent or premium payable in respect of the premises being let as licensed premises," that is to say, the rent reserved by the lease must be analysed so as to shew how much of it is due to the premises without a licence and how much is due to the existence of the licence. Now, the rent reserved is in respect of the existing premises. It is clear, therefore, to my mind, that one must look at the premises de facto, and that one ought not to enter upon an inquiry as to how much a speculator could make, not out of the premises, but out of the site upon which they stand. It may be that in some cases some small alterations would be required in order to make the premises worth anything at all without a licence; but in the present case the county court judge has found as a fact on evidence that the premises could be let for 240*l.*, if unlicensed, without any alterations at all. I think the county court judge was right in not taking into consideration the evidence given for the defendants as to what the value of the site would be if some totally different premises were erected on it.

---

(1) [1913] A. C. 650.

(2) [1913] A. C. at p. 673.

Appeal dismissed.

Solicitors for plaintiffs: *Rawle, Johnstone & Co., for Wright, Hassall & Co., Leamington.*

Solicitors for defendants: *Warren, Murton & Miller, for Lamb & Stringer, Kettering.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1914
Jan. 26, 31.

MORGAN *v.* HART.

Practice — Execution — Receiver, Appointment of — Equitable Execution — Supreme Court of Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.

The Court has no jurisdiction to appoint a receiver by way of equitable execution (so called) in aid of a judgment at law except in cases in which execution cannot be levied in the ordinary way, by reason of the nature of the property, and in which the Court of Chancery before the Judicature Act would have had jurisdiction to make the order.

Harris v. *Beauchamp Brothers* [1894] 1 Q. B. 801 followed.

Decision of Scrutton J. reversed.

On August 28, 1913, the plaintiff, W. H. Morgan, obtained judgment against the defendant, A. A. Hart, for 55*l.* 1*s.* 6*d.* due on a bill for medical attendance on the defendant and his family for two years, and 8*l.* 10*s.* costs. The plaintiff applied in chambers in the King's Bench Division for the appointment of a receiver. The application was supported by an affidavit stating that the judgment remained unsatisfied to the extent of 49*l.* 7*s.* 6*d.*, and that the defendant had no property which could be taken by ordinary powers of execution. It further stated that the plaintiff had consented to the payment of the debt and costs by instalments, but that the defendant had paid one instalment and then made default and removed all his furniture and effects from his residence to a very large furniture repository at Southend. The owner of the repository had been interviewed by the plaintiff's solicitor and admitted that the said furniture and effects were in the repository, but stated that the sheriff would be quite unable to seize them, as they could not be identified from other people's furniture, and that he would not give any assistance. He further informed the solicitor that he was in treaty with the defendant to buy the furniture and effects. On December 19, 1913, the Master made an order appointing the plaintiff receiver, without security or remuneration, "to receive the rents, profits and moneys receivable in respect of the defendant's interest in the following property, namely, all the furniture and effects now stored by the defendant in the furniture repository owned by George Jackaman at London Road, Southend; but he should not receive more than 49*l.* 7*s.* 6*d.* and the costs of the order."

The defendant appealed to the judge, but Scrutton J. dismissed his appeal on January 15, 1914.

The defendant appealed to the Court of Appeal, and his appeal now came on before Buckley and Phillimore L.JJ.

H. M. Giveen, for the appellant. The Court has no jurisdiction to appoint a receiver in aid of a judgment at law, except in cases in which there is some difficulty, arising from the nature of the property, in applying the ordinary methods of execution: *Holmes* v. *Millage*. (1) The Judicature Act, 1873, did not give power to appoint a receiver in cases where the Courts of Equity could not appoint one before: *Harris* v. *Beauchamp Brothers*. (2) In that case it is laid down that the Court is not "to invent new modes of enforcing judgments." That is exactly what the respondent is asking the Court to do here. *Edwards & Co.* v. *Picard* (3) also shews that a receiver cannot be appointed merely because it is convenient. In *Manchester and Liverpool District Banking Co.* v. *Parkinson* (1) it was said that the Court would appoint a receiver under special circumstances, but *Harris* v. *Beauchamp Brothers* (2) shews that the special circumstances must be limited to those under which the Court of Chancery would have made the appointment before the Judicature Act.

---

(1) [1893] 1 Q. B. 551.

(2) [1894] 1 Q. B. 801, 809.

(3) [1909] 2 K. B. 903.

In *Whitaker* v. *Cohen* (3) application was made for the appointment of a receiver of furniture of which a married woman had the use, and it was refused because she could not be compelled to let or sell it, and there was nothing to receive. That is the case here; the appointment is only desired in order to get an opportunity to examine the defendant.

S. Lynch, for the respondent. The property is a proper subject for execution by fi. fa. The execution creditor knows where it is but cannot identify it, and there are no means by which he can compel the custodian to give him the necessary information. In *Holmes* v. *Millage* (4) the plaintiff asked for a receiver of a man's future earnings. The Court has never made such an appointment. Here the furniture has been removed from the debtor's house and placed where the execution creditor cannot identify it. The owner of the repository appears to be acting in a double capacity, for he says he is in treaty for the purchase of the furniture. These circumstances are special circumstances within the meaning of *Harris* v. *Beauchamp Brothers* (2), which states that a receiver may be appointed in aid of a legal judgment under special circumstances. Similar orders are constantly made in King's Bench Division chambers.

BUCKLEY L.J. In this case the plaintiff sued the defendant for moneys due for medical attendance and recovered a judgment on which 49*l.* is still due. The plaintiff agreed to accept payment by instalments, but the defendant has made default. Under those circumstances the plaintiff has obtained from the Master this order: [The Lord Justice read the order and stated the facts as to the furniture above stated, and continued.] It is

(1) (1888) 22 Q. B. D. 173.
(2) [1894] 1 Q. B. 801.
(3) (1893) 69 L. T. 451.
(4) [1893] 1 Q. B. 551.

C. A.
1914

MORGAN
v.
HART.

Buckley L.J.

an order appointing a receiver to receive the rents, profits, and moneys receivable in respect of the furniture. There are no rents or profits or moneys receivable. The order has no effect except that which is equivalent to an injunction restraining the debtor from dealing with his furniture. In my opinion that is wrong. The jurisdiction is contained in the Judicature Act, 1873, s. 25, sub-s. 8, which runs: "A mandamus or an injunction may be granted, or a receiver appointed, by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." The question is whether the Court has jurisdiction to make the order under the words "just and convenient." The result of the authorities, to some of which I will refer, is in my opinion that the section does not give to the Courts either of Law or Equity any wider jurisdiction than existed before, but enables such orders as could be made before to be made in any proceedings, without commencing special proceedings in the Court of Chancery such as were necessary before the Act.

In *Smith* v. *Cowell* (1) a creditor had recovered judgment against a debtor and sued out a writ of elegit. The debtor's only interest in real estate was an equity of redemption. Before the Judicature Act the plaintiff could have obtained the appointment of a receiver, but only by filing a bill in equity. There was no doubt that he had a right to resort to the property, it was a question of procedure how he could resort to it, and the Court of Appeal decided that the Court could appoint a receiver "brevi manu" under this section, without requiring the plaintiff to file a bill in Chancery. In *Manchester and Liverpool District Banking Co.* v. *Parkinson* (2) there are some observations which tend to support the present application, though the order was there refused. The head-note states the decision thus: "Held, that, in the absence of any legal impediment to obtaining execution of the judgment in the ordinary course of law by fieri facias, or attachment of debts, and there being no special circumstances shewing it to be just or convenient that a receiver should be appointed, the order for appointment of a receiver was wrongly made, and ought to be rescinded."

(1) (1880) 6 Q. B. D. 75.

(2) 22 Q. B. D. 173.

The Court refused to make the order for a receiver, but said that it might be made under special circumstances. Fry L.J. says (1): "Undoubtedly, if any special circumstances had existed shewing it to be just or convenient to make the order for a receiver, the case might have been different, and there might possibly have been jurisdiction to make such an order under s. 25 of the Judicature Act, 1873. . . . . I do not say that there would have been no jurisdiction to appoint a receiver under that section, if there had been special circumstances in the case rendering it just or convenient to make such an order. It may be, for instance, that an order could be made for appointment of a receiver to hold property liable to execution, to prevent some one making away with it, or to get in debts, where under particular circumstances it was a more convenient mode of procuring satisfaction of the judgment than the usual process of attachment. No special circumstances of that sort were shewn in the present case."

In *In re Shephard* (2) the facts were that a judgment creditor had for his debtor one who possessed a freehold estate subject to a mortgage. The debtor's interest was an equitable interest which might have been reached by proper proceedings. A summons was taken out for a receiver in the debtor's lifetime, but he died before it was heard. Two days after his death a receiver was appointed in chambers without reviving the action or making the debtor's heir-at-law a party. The day before this appointment the same person had been appointed interim receiver in an action for the administration of the debtor's estate. The judgment creditor then moved before Chitty J. for an order that the receiver should apply all the rents of the freeholds in satisfaction of his judgment debt. Chitty J. refused the motion; the Court of Appeal affirmed the decision on the ground that the order appointing a receiver on the judgment creditor's application was wrong because it was made ex parte. But the judgments contain some valuable observations on the question before us. Cotton L.J. says (3): "Confusion of ideas has arisen from the use of the term 'equitable execution.' The expression

---

(1) 22 Q. B. D. 177.
(2) (1889) 43 Ch. D. 131.
(3) 43 Ch. D. 135.

C. A.
1914

MORGAN
v.
HART.

Buckley L.J.

tends to error. It has often been used by judges, and occurs in some orders, as a short expression indicating that the person who obtains the order gets the same benefit as he would have got from legal execution. But what he gets by the appointment of a receiver is not execution, but equitable relief, which is granted on the ground that there is no remedy by execution at law; it is a taking out of the way a hindrance which prevents execution at common law. Until recently nobody ever thought that an order for a receiver could be obtained in aid of a legal judgment unless there was a hindrance to obtaining execution at law. If any practice has grown up of granting such an order where there is no hindrance to obtaining execution at law it is a practice which has never been brought before the Court of Appeal, and which in my opinion is wrong." Perhaps the expression "hindrance" requires some explanation. The learned judge meant, I think, hindrance arising from the nature of the property. Bowen L.J. says (1): "But even supposing that legal execution could be issued ex parte, it does not follow that what is called equitable execution can be so issued. Equitable execution is not like legal execution; it is equitable relief, which the Court gives because execution at law cannot be had. It is not execution, but a substitute for execution. It would in my opinion be wrong to say that an order for a receiver can be made in the Chancery Division ex parte without any notice to the person whose property is to be affected." Fry L.J. says (2): "A receiver was appointed by the Court of Chancery in aid of a judgment at law when the plaintiff shewed that he had sued out the proper writ of execution, and was met by certain difficulties arising from the nature of the property which prevented his obtaining possession at law, and in these circumstances only did the Court of Chancery interfere in aid of a legal judgment for a legal debt." In *Holmes* v. *Millage* (3) the application was for the appointment of a receiver of future earnings. The case is not strictly in point on the present question, but there is a passage in the judgment of the Court delivered by Lindley L.J. which states the law on the point before us. He says (1): " We have nothing to do here with a suit to enforce a charge created by the debtor. We have simply to deal with a case in which an ordinary judgment creditor sought the aid of a Court of Equity to enforce his judgment against property not capable of being reached by any common law process. The only cases of this kind in which Courts of Equity ever interfered were cases in which the judgment debtor had an equitable interest in property which could have been reached at law, if he had had the legal interest in it, instead of an equitable interest only." The case most nearly in point is *Harris* v. *Beauchamp Brothers.* (2) The head-note in that case states: " The Court has no jurisdiction to appoint a receiver merely because, under the circumstances of the case, it would be a more convenient mode of obtaining satisfaction of a judgment than the usual modes of execution." The facts were that the plaintiff had brought an action against two partners, one of whom was a minor, in their firm name. He recovered judgment with a proviso that execution should not issue against the infant's separate estate. The partnership premises and stock in trade had been partially destroyed by fire. The premises and stock in trade were insured by certain policies the amount payable under which was to be ascertained by arbitration, but had not yet been ascertained. The partners had issued a circular saying that they proposed to give security to their creditors by assigning the policy moneys to a trustee for payment of the creditors. The judgment creditor obtained from Wright J. the appointment of a receiver of the policy moneys and the book debts of the firm, and the Divisional Court on appeal affirmed the appointment. The defendants appealed to the Court of Appeal, and the judgment of the Court allowing the appeal was delivered by Davey L.J. He said (3): " The learned counsel for the plaintiff boldly argued, that, if you have got a subject-matter which might be made available for the satisfaction of the judgment debt, you may have a receiver, if it is a better mode of getting it in than the usual mode. In our opinion, this is wrong." And a little further on he says: " The case of *Manchester and Liverpool District Banking Co.* v.

---

(1) 43 Ch. D. 137.

(2) 43 Ch. D. 138.

(3) [1893] 1 Q. B. 551.

---

(1) [1893] 1 Q. B. 555.

(2) [1894] 1 Q. B. 801.

(3) [1894] 1 Q. B. 801, 806, 810, 811.

Parkinson (1) was referred to in the Court below as shewing that the order might be made under special circumstances. It would be rash and unwise to attempt to define the special circumstances which would justify the making of an order such as that which we have before us. But for reasons which will appear from what has been already said, we think they must be such circumstances as would have enabled the Court of Chancery before the Judicature Act to have interfered by way of injunction or receiver at the suit of the judgment creditor." He then goes on to consider the special circumstances of that case and continues: "We are, however, far from saying that, if a case were established to the satisfaction of the Court that the defendants threatened and intended 'fraudulently' (we use the word advisedly) and for the purpose of delaying and defeating the creditors to make away with the property, it would not justify the interference of the Court." That is to say that if fraud is proved the Court may be entitled to intervene to stop the fraud and preserve the property. Otherwise under no circumstances can such an order be made. He then goes on to say at the end of his judgment: "We do not forget that it was stated at the Bar that the learned judge, when the matter came before him again in September, explained his previous order in a note, and directed the money to be paid into Court. His note was to the effect that he appointed the receiver, not so much by way of execution as to preserve the assets for the Court to give effect to the rights of the parties interested. We are of opinion that the learned judge had no jurisdiction to make such an order. This is not equitable execution, but administration, which the Court had no jurisdiction to order, at any rate in this action. It was in fact an irregular substitute for a receiving order in bankruptcy." Equally in the present case the order is irregular because it is made not for the purposes of execution, but in order to keep the property where it is until the plaintiff can get discovery. The case of *North London Ry. Co.* v. *Great Northern Ry. Co.* (2) is a case of an injunction, and is only relevant because the power to grant an injunction is given by the same s. 25 sub-s. 8, of the Judicature Act, 1873, as gives the power to appoint a receiver, and is given in the same words. It was

---

(1) 22 Q. B. D. 173.

(2) (1883) 11 Q. B. D. 30.

C. A.
1914

Morgan
v.
Hart.

Buckley L.J.

there held that the section gave no power to the Court to grant an injunction in a case in which no Court could have granted one before the Act.

Applying these cases, the facts here are that the debtor has property which could be reached by a fi. fa., but there is a difficulty in identifying it. The object is to obtain what is equivalent to an injunction until the creditor can get discovery. The Court of Chancery would not have made such an order before the Judicature Act. We cannot do so now. The appeal must be allowed.

Phillimore L.J. I agree, and have very little to add. At most my words will only amount to an academic opinion. I do not presume to compare myself with the authorities who have decided *Manchester and Liverpool District Banking Co.* v. *Parkinson* (1) and *Harris* v. *Beauchamp Brothers.* (2) As I understand those cases, there may be special circumstances under which a receiver may be appointed, but they must be such circumstances as would have enabled the Court of Chancery to make an order before the Judicature Act of 1873. In this case one has considerable sympathy with a man trying to get his dues, who is defeated by an accident, but by our law he must indicate to the sheriff the chattels he wishes to have seized, and, unfortunately for him, owing to their being mixed up with the goods of others, he is unable to exercise his common law right. It is possible that he may have a remedy under Order xlii., rr. 32 and 33, and I am not certain whether if he applied those two rules together he could not get relief here. But I quite agree that his present application is a mistake. The appeal must therefore be allowed.

Appeal allowed.

Solicitors: *Cohen & Cohen; Young & Grave.*

(1) 22 Q. B. D. 173.

(2) [1894] 1 Q. B. 801.

J. R. B.

1912
June 4, 5, 6;
July 2.

[RAILWAY AND CANAL COMMISSION.]

DUBLIN AND MANCHESTER STEAMSHIP COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway—Undue Preference by Railway Company of themselves as Carriers—Legitimate Competition—Through Rate—Proportion of Rate appropriated to Conveyance by Sea—Particulars in Rate-book—Railway and Canal Traffic Act, 1888 (51 & 52 *Vict. c.* 25), *s.* 33, *sub-s.* 5.

The applicants, who were carriers, conveyed goods in their own steamers between Dublin and Manchester, the goods being carried on the defendant company's railway between Manchester and certain towns in England. The defendant company carried goods at a through rate between the same towns in England and Dublin via Holyhead, the land transit being over the defendant company's railway, and the sea transit being performed by their steamers. The defendant company by allowing rebates to the consignors of goods reduced the rate per mile for the land carriage via Holyhead so that it was less than the rate for the land carriage via Manchester. The applicants alleged that the defendant company thereby unduly preferred themselves as carriers:—

Held, on the evidence, that the reduction was the natural result of, and necessary for, fair competition, and that it, therefore, did not constitute an undue preference by the defendant company of themselves.

Sect. 33, sub-s. 5, of the Railway and Canal Traffic Act, 1888, provides that: "Where a railway company carries merchandise partly by land and partly by sea, all the books, tables, and documents, touching the rates of charge of the railway company, which are kept by the railway company at any port in the United Kingdom used by the vessels which carry the sea traffic of the railway company, shall, besides containing all the rates charged for the sea traffic, state what proportion of any through rate is appropriated to conveyance by sea, distinguishing such proportion from that which is appropriated to the conveyance by land on either side of the sea."

The defendant company's rate-book at Dublin contained a notice that "The sea proportion of rates in this book between Dublin and English stations is represented by a mileage share as for 70 miles of the throughout distance":—

Held, that this notice was a sufficient compliance with the requirements of s. 33, sub-s. 5.

Held, also, that the particulars of the proportion of a through rate appropriated to the conveyance by sea need not appear in the rate-book

1912

DUBLIN AND MANCHESTER STEAMSHIP COMPANY v. LONDON AND NORTH WESTERN RAILWAY.

kept at a port which is not the port at which the merchandise is received for conveyance but is a port of call only.

APPLICATION to the Court of the Railway and Canal Commission.

The application was as follows:—

1. The applicants are shipowners, carriers, brokers and forwarding agents, carrying on business at Dublin and Manchester, and they own and work steamship vessels and carry therein goods and other traffic between the port of Manchester and the port of Dublin.

2. A large portion of the said traffic consists of goods sent by the defendants' railway from inland places in England and consigned to the applicants at Manchester for conveyance therefrom by their vessels to Dublin, and of goods consigned to the applicants at Dublin for conveyance therefrom to Manchester and other places in England situated on the defendants' railway. There are no through rates in operation for such traffic.

3. The defendants are owners of steam vessels which they work between the port of Holyhead and the port of Dublin, and they carry goods between inland places in England and Dublin by means of their railway and their said steam vessels at through rates.

4. The applicants as carriers compete with the defendants for the carriage of goods between places in England and Dublin.

5. By s. 14 of the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), it is enacted, amongst other matters, that "Every railway company and canal company shall keep at each of their stations and wharves a book or books showing every rate for the time being charged for the carriage of traffic, other than passengers and their luggage, from that station or wharf to any place to which they book, including any rates charged under any special contract, and stating the distance from that station or wharf of every station, wharf, siding, or place to which any such rate is charged . . . .

"Any company failing to comply with the provisions of this section shall, for each offence, and in the case of a continuing offence, for every day during which the offence continues, be liable to a penalty not exceeding 5*l*."

6. By sub-s. 5 of s. 33 of the Railway and Canal Traffic Act, 1888, it is enacted that "Where a railway company carries merchandise partly by land and partly by sea, all the books, tables, and documents, touching the rates of charge of the railway company, which are kept by the railway company at any port in the United Kingdom used by the vessels which carry the sea traffic of the railway company, shall, besides containing all the rates charged for the sea traffic, state what proportion of any through rate is appropriated to conveyance by sea, distinguishing such proportion from that which is appropriated to the conveyance by land on either side of the sea."

7. The through rates charged by the defendants on traffic conveyed by them between places in England and Dublin and referred to in paragraph 3 are not, in the cases mentioned in the schedule hereto (which are set forth as examples), the rates which are declared in the rate-books kept by them for public inspection to be the rates in operation between the said places.

8. The rates actually charged by the defendants in the cases referred to in paragraph 7 are very much lower than the said rates entered in the defendants' rate-book by reason of the fact that the defendants habitually allow to the consignors or consignees of the traffic in such cases the rebates set forth in the schedule.

9. No consideration is given for the said rebates by way of services rendered or accommodation provided, or otherwise, in relief of the defendants by the consignors or consignees of the said traffic upon which such rebates are allowed, and the rate-books kept by the defendants for public inspection do not contain particulars or even any reference to the said rebates.

10. The rate-books kept by the defendants at the ports of Holyhead and/or Dublin for public inspection do not show what proportions of the through rates set forth in the said schedule are attributable to conveyance by sea or distinguish such proportions from those which are appropriated to the conveyance by land, nor do any of the rebates set forth in the schedule appear in such books.

11. The defendants in the cases referred to in the said schedule

have therefore failed to comply with the provisions of the said enactments.

12. By means of the allowance of the said rebates the defendants have deprived the applicants of large quantities of the traffic referred to in paragraph 2, and diverted such traffic to the defendants' own route, and have thereby caused the applicants to suffer serious loss.

13. The applicants complain that by reason of the matters referred to herein the defendants unduly prefer themselves as carriers, and subject the applicants as carriers to undue and unreasonable prejudice and disadvantage.

The applicants applied for (i.) an order enjoining the defendants to desist from unduly preferring themselves as aforesaid, and from subjecting the applicants to undue or unreasonable prejudice or disadvantage in respect of the matter herein complained of or in any respect whatsoever.

(ii.) An order directing the defendants to keep for public inspection at each of the English stations mentioned in the schedule a book or books shewing the rates for the time being charged on the traffic and between the places referred to in the schedule.

(iii.) An order directing the defendants to state in the book of rates kept by them at the ports of Holyhead and/or Dublin for public inspection what proportion of each of the through rates mentioned in the schedule is appropriated to conveyance by sea and to distinguish such proportion from that which is appropriated to conveyance by land on either side of the sea.

The defendants by their answer admitted paragraphs 1, 3, 4, 5, and 6 of the application; and that there were no through rates in operation for the traffic referred to; and that they allowed rebates in respect of the traffic referred to in paragraph 3 of the application; and that the rate-books containing the rates for traffic conveyed by them between places in England and Dublin did not contain particulars of or reference to rebates.

The defendants admitted the allegations in paragraph 10 of the application so far only as they referred to the rate-books kept at the port of Holyhead. Such rate-books did not contain any of the rates set forth in the schedule to the application, or any through rates between inland places in England and Dublin. With regard to the rate-books at Dublin the defendants admitted that none of the rebates appeared therein. The proportions of the through rates from Dublin which were appropriated to conveyance by sea were stated in those rate-books and were distinguished from the proportions which were appropriated to the conveyance by land by the following notice inserted in the rate-books: "The sea proportion of rates in this book between Dublin and English stations is represented by a mileage share as for 70 miles of the throughout distance." The defendants further contended by their answer that the applicants' allegations as to the defendants' non-compliance with s. 14 of the Regulation of Railways Act, 1873, and s. 33, sub-s. 5, of the Railway and Canal Traffic Act, 1888, disclosed no complaint which the Court of the Railway and Canal Commission had jurisdiction to determine.

Witnesses were called by both sides. The facts with regard to the alleged undue preference are stated in the judgments.

Balfour Browne, K.C. (*Rowland Whitehead, K.C.*, and *Clements* with him), for the applicants. First, with regard to the allegation of undue preference, it has been held that a railway company is capable of giving an undue preference to itself: *In re Baxendale and North Devon Ry. Co.* (1); *In re Baxendale and Great Western Ry. Co.* (2) The effect of the decisions is summed up in Macnamara on Carriers by Land, 2nd ed. at p. 450, as follows: "A railway company have no right to prefer themselves or their agents to the public and to carriers other than themselves. A railway company is bound to treat common carriers the same as other customers for all purposes, including the mode of charging in the aggregate." In the case of goods which have come from Dublin to Holyhead in the defendants' steamers, a rebate is allowed to the trader with the result that the portion of the rate applicable to the journey from Holyhead to the town of destination is less than the rate charged in the case of goods carried by the applicants' steamers from Dublin to Manchester and thence in the defendants' trains to the same towns, although the distance

(1) (1857) 3 C. B. (N.S.) 324.

(2) (1858) 5 C. B. (N.S.) 336.

1912

DUBLIN AND MANCHESTER STEAMSHIP COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY.

from Holyhead is the greater. That shews clearly that the defendants are unduly preferring themselves as carriers and subjecting the applicants to an undue prejudice. The defendants do not shew the rebates in their rate-books, and the omission to do so is a contravention of s. 14 of the Regulation of Railways Act, 1873, which requires that the rates for the time being charged are to be in the rate-book.

Secondly, the defendants have contravened s. 33, sub-s. 5, of the Railway and Canal Traffic Act, 1888, in that the rate-books at Dublin and Holyhead do not state what proportion of the through rate is appropriated to the conveyance by sea. It is admitted by the defendants that the rate-book at Holyhead does not contain that information, and the notice which is relied on by the defendants in the case of the Dublin rate-book is not a sufficient compliance with s. 33, sub-s. 5, of the Act of 1888. The rate-book does not give the actual total distances between Dublin and the various towns to which the rates apply, and, therefore, the statement in the notice that the sea proportion of the rates "is represented by a mileage share as for 70 miles of the throughout distance" is merely illusory.

The defendants by their answer contend that this Court has no jurisdiction to make any order with regard to these omissions from the rate-books. The Court clearly has jurisdiction: see s. 6 of the Regulation of Railways Act, 1873; *Perkins* v. *London and North Western Ry. Co.* (1); *Great Southern and Western Ry. Co. of Ireland* v. *Dublin and South Eastern Ry. Co.* (2)

Sir Alfred Cripps, K.C., and *Bailhache, K.C.* (*Mains* and *Bruce Thomas* with them), for the defendants. The defendants do not raise any question as to the jurisdiction of the Court to deal with all the matters raised by this application. With regard to the alleged undue preference it is not denied by the defendants that they are not entitled to give an undue preference to themselves to the detriment of a rival carrier. Their case is that the facts shew that there has been no undue preference. Lowering rates in order to meet competition, and that is what the defendants have done, is not undue preference: *Phipps* v.

(1) (1874) 1 Ry. & Ca. Tr. Cas. 327.

(2) (1907) 13 Ry. & Ca. Tr. Cas. 176.

London and North Western Ry. Co.(1) The applicants are an independent steamship company and are not amenable to this Court. By undercutting the charges between Dublin and this country they were attempting to withdraw the traffic from the other carriers including the defendants. In order to meet this competition, the defendants by means of rebates reduced their charges to those of the applicants. This may be a preference, but it is not an undue preference, provided that the reduction does not go beyond the limits of fair competition: *Liverpool Corn Traders' Association* v. *Great Western Ry. Co.* (2); *Spillers & Bakers* v. *Taff Vale Ry. Co.* (3); *Castle Steam Trawlers* v. *Great Western Ry. Co.*(4) The comparison of the charges from Holyhead and Manchester respectively to the same towns in England does not really shew any inequality, for the rate from Holyhead is part of a through rate and the rate fröm Manchester is a local rate. It is therefore not a comparison of like with like: *Levers* v. *Midland Ry. Co.*(5)

It is conceded that the rate-books should have disclosed the amount of deduction allowed by way of rebates, and that the rates actually charged were not the rates to be found in the rate-books.

The notice in the rate-book at Dublin is a sufficient compliance with s. 33, sub-s. 5, for the book contains the "throughout" distances for the various groups of towns, and thus a calculation can be made which will shew in any particular case what proportion of the through rate is appropriated to the conveyance by sea. The section was not intended for the protection of traders, for they are not interested in knowing, and indeed are not entitled to know, how a through rate is apportioned between the sea and land transit, but of rival carriers like the applicants, and for their purposes this note is quite sufficient. It may be that the note would not give all the requisite information in cases where the goods came from some inland town in Ireland, but that is not this case, and this Court will not make an order against the defendants on the ground of a purely hypothetical contravention of the section: *City of Dublin Steam Packet Co.* v. *London and North Western Ry. Co.* (1) Lastly, it is not necessary that the rate-book at Holyhead should contain any entry under s. 33, sub-s. 5, for the section only applies to the port at which the merchandise is received for conveyance, that is in this case Dublin. Holyhead is merely a port of call, where there are in fact no through rates for sea and land conveyance.

---

(1) [1892] 2 Q. B. 229.

(2) (1892) 8 Ry. & Ca. Tr. Cas. 114.

(3) (1903) 12 Ry. & Ca. Tr. Cas. 70.

(4) (1908) 13 Ry. & Ca. Tr. Cas. 145.

(5) (1909) 13 Ry. & Ca. Tr. Cas. 301.

Balfour Browne, K.C., replied.

Cur. adv. vult.

1912. July 2. A. T. Lawrence J. read the following judgment:—The applicant, who trades as the Dublin and Manchester Steamship Company, is a carrier by sea between Dublin and Manchester. He commenced business in 1897, shortly after the opening of the Manchester Ship Canal. The application is based on three grounds, but the principal one is an alleged undue preference by the defendants of themselves as carriers of stout, cattle, and wool between Dublin and Coventry, Leamington, Birmingham, Oldham, Stalybridge, and Huddersfield respectively. The rates to these places in force when applicant commenced business were through rates which had been fixed by agreement by a number of carriers called the Dublin Conference. The applicant carried at lower rates than these, and by thus "cutting rates" secured some of the defendants' customers at these towns. The applicant had a perfect right to do this; but after some time the defendants discovered the cause of their customers leaving them, and in these towns reduced the rates in force. This they did by granting those customers rebates. These rebates were not entered in the rate-books, and as the effective rates became the lower sums, that is, the original rates less those rebates, this omission was a clear infraction of s. 14 of the Act of 1873. This omission forms the ground of complaint next in importance in this application. The defendants have not attempted to justify the omission, and admit it must be corrected. It is sufficient to say that there will be an order to that effect.

---

(1) (1881) 4 Ry. & Ca. Tr. Cas. 10.

Before I deal further with the question of undue preference, I will dispose of the only other point in the case, namely, an alleged infraction of s. 33, sub-s. 5, of the Act of 1888. This section requires railway companies who are carriers by land and sea at through rates to state in the rate-book kept at the port the amount of the rate attributable to the sea portion of the route. The defendants claim to have done this by a note in the rate-book which is in these words: "The sea proportion of rates in this book between Dublin and English stations is represented by a mileage share as for 70 miles of the throughout distance." For the applicant it is said this is not a sufficient compliance with the statute. When the words of the section are closely examined, it does seem to demand a more detailed statement. But when I asked what useful purpose the fullest information could afford a trader, counsel wholly failed to name any such purpose. Apparently, the section is for the benefit not of traders but of rival carriers who may wish to know what their powerful railway competitors are doing, and may bring them before this Court if they find any ground of complaint. Now this purpose is not one that requires such simplicity in the form of words used that he who runs may read; it is sufficient if it enables a person who reads it carefully to make the necessary calculation. This the applicant's tables shew this note did for the applicant. I think it might be improved and made clearer. I do not think we ought so to read this section as to cast upon railway companies the burden of making countless entries in rate-books apportioning rates of every kind. To do this would make rate-books so complicated that an ordinary trader would not be able to use them. To the trader the rate-book is of great importance in his business; to the rival carrier it is a mere weapon, and is as useful in this form as in any other. As to the subsidiary point that the rate-book at Holyhead should contain this note, I think it is not correct either of the rate from Birmingham to Dublin or of the rates for traffic from Dublin to England. Sub-s. 5 must be read with the rest of the section. I do not think it can be necessary to keep a duplicate rate-book at every port at which a steamer may call. This section (as well as s. 14 of the Act of 1873) is dealing with what books must be kept, and what must appear in the books "at the station at which merchandise is received for conveyance."

I have now to consider the main question, that is of undue preference. The charge is based on the fact that the defendants' rate via Holyhead has been reduced to the same amount as the applicant's rate via Manchester, except in one instance, Leamington, where in ignorance of the amount to which the applicant's rate had been reduced the rebate was made 6*s.*, or 3*s.* below the applicant's rate. This was clearly done in error and cannot determine this case. The Leamington rate should be corrected. It is said that when this rate via Holyhead is compared with the rate which the applicant is charged for sending his traffic forward from Manchester it appears that the charge per mile is higher from Manchester. Thus, if Coventry be taken as an example, the charge per mile works out at 1·11*d.* per mile from Holyhead to Coventry, and at 1·96*d.* per mile from Manchester to Coventry. This is undoubtedly true, but it is the old case of comparing a section of a through rate with a local rate. This has never been held to be a good ground for holding the through rate to be an undue preference even where the traffic passes over the same rails. Here it does not, but comes over sections of the company's system as widely different as North Wales from the heart of Lancashire. The Court is fully alive to the importance of seeing that railway companies do not drive rival carriers out of business, and if there were the smallest ground for believing that any such policy was being pursued here we should strive to prevent it succeeding. But there is none. Indeed, Mr. Lowen, who represents the applicant and gave his evidence in the fairest way, did not suggest it. Further, if it were clear that, although there was no design so to injure, still such was the inevitable result to a rival, although he had a sound commercial route, we should be astute to see whether it could not be prevented. There is no satisfactory evidence of either branch of this proposition here; in fact, the applicant seems to be doing well, and the volume of his trade is as great as ever. It is clear that he himself brought about this reduction of rate by cutting the existing rate. It seems to me impossible to say that what was fair competition in his case became undue preference when done for his rivals. The railway company has to be regarded in two capacities, that of a carrier having a Holyhead route and a company having statutory duties. So long as it acts fairly it is under no obligation to allow the applicant to starve its Holyhead route in order that he may compete more profitably from Manchester.

Then it was suggested for the applicant that he was entitled to require the railway company to "give him a differential," as it was called, that is to say, to compensate him for any inferiority in his route or his service by maintaining the railway company's rates at a higher level than his. It was shewn that some Irish carriers did this, some by statute, others by agreement. We are asked to incorporate the practice into the law of undue preference and to say that, where there is no statute and no agreement, not to do so is an undue preference by the railway company of itself. The case had not been shaped or opened or any evidence adduced on these lines, and it is sufficient to say that we see no ground for acceding to the argument. It would be to stereotype rates at a level higher than those of the worse competitor. The case for undue preference wholly fails.

There must be an order that the rate-book be amended by shewing the distances for each of the places above mentioned and shewing the respective rebates allowed for this traffic.

HON. A. E. GATHORNE-HARDY read the following judgment:—The applicants are shipowners carrying on business in Dublin and Manchester, and a large proportion of their business consists of carrying goods from Dublin to Manchester by sea, and thence to inland towns in England over the defendants' line. Being a private company not under parliamentary control there are no through rates in operation for this traffic. The defendants are owners of steam vessels which they work from Dublin to Holyhead, and by means of these vessels they convey goods to the same inland towns in active competition with the applicants at through rates. The applicants make three complaints against the defendants, with which I shall deal in their order.

The first complaint is of non-compliance with s. 14 of the

Regulation of Railways Act, 1873, which runs as follows: "Every railway company and canal company shall keep at each of their stations and wharves a book or books showing every rate for the time being charged for the carriage of traffic from that station or wharf to any place to which they book, including any rates charged under any special contract, and stating the distance from that station or wharf of every station, wharf, siding, or place to which any such rate is charged."

The first, and most serious, complaint with regard to this section was that the rates shewn in the rate-book were not those at which the traffic was actually carried, but were reduced by rebates given to the customers, such rebates being secret in the sense that no notice of them appeared in the rate-book. This complaint was clearly proved, and the counsel for the defendants did not, and indeed could not, make any attempt to justify the breach in question. Their principal witness, Mr. Jepson, the defendants' assistant goods manager, admitted, with candour which did him credit, that if the rebates had been inserted in the book other traders would have claimed the same advantage, and that he would have laid himself open to a charge of undue preference, and, also, that he could not have reduced or abandoned the rebate without having to justify an increase of rate before this tribunal. In other words, he pleaded guilty to a violation of the enactment for the very purposes which it was framed to prevent. As I stated in the Irish case *Great Southern and Western Ry. Co. of Ireland* v. *Dublin and South Eastern Ry. Co.* (1), "It is most important, in the interests of the public, that the rate-book should contain a true account of the amount actually charged for the carriage of goods and merchandise with all the consequences as to permanence involved in the fixing and publication of a rate." Such non-publication and secrecy raise, and justly raise, suspicion, and the defendants have only themselves to blame if in this case a claim has been made against them which might never have been brought forward if they had openly entered their true rates in the book. This Court can have no hesitation in making the order asked for, that the defendant must keep for inspection a book shewing the rates for the time being charged; and these rates must, of course, be the actual rates as reduced by the rebates.

---

(1) 13 Ry. & Ca. Tr. Cas. at p. 205.

A second point, and one of much less importance, arises under sub-s. 5 of s. 33 of the Railway and Canal Traffic Act, 1888, which enacts as follows: "Where a railway company carries merchandise partly by land and partly by sea, all the books, tables, and documents, touching the rate of charge of the railway company, which are kept by the railway company at any port of the United Kingdom used by the vessels which carry the sea traffic of the railway company, shall, besides containing all the rates charged for the sea traffic, state what proportion of any through rate is appropriated to conveyance by sea, distinguishing such proportion from that which is appropriated to the conveyance by land on either side of the sea." The public rate-book kept at Dublin contained the following note: "The sea proportion of rates in this book between Dublin and English stations is represented by a mileage share as for 70 miles of the throughout distance." This the defendants alleged to be a sufficient compliance with the statute. The applicants claimed that the actual sum charged for sea carriage should be set out in each instance. It did not appear that the form of this note raised any real difficulty in the way of the applicants in the framing of the tables by means of which they sought to establish undue preference, and to do the sum in every case would tend to make the rate-book unduly bulky and intricate. I am of opinion that "the proportion of the through rates which are appropriated to conveyance by sea" may be properly conveyed by means of a note, but that such a note should be so plain and clear as to be capable of no misunderstanding or doubt as to its meaning. The section, as the learned judge has pointed out, is framed in the interests of rival carriers, and does not, therefore, require such simplicity of form as it would if intended for the general public. I agree with the learned judge that it will be sufficient if it enables a person who reads it carefully to make the necessary calculation. I also agree with him that it is not necessary that the book at Holyhead should contain a duplicate of the note.

I also agree with him upon the third and main question of

1912

DUBLIN AND MANCHESTER STEAMSHIP COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY.

undue preference. In the case of the rate for the carriage of stout from Dublin to Leamington an excessive rebate of 6*s.* has been given in error, and this must be corrected; but there is nothing to shew that in the other cases there is more than ordinary and legitimate competition. The case for undue preference wholly fails, for the reasons given in the judgment just delivered, to which I think it unnecessary to add anything further.

SIR JAMES WOODHOUSE read the following judgment:—Upon the substantial issue in this case, namely, that of undue preference, I agree with my colleagues. Questions of undue preference are always difficult ones, and they depend for their solution upon the actual facts and circumstances of each particular case. Preference is only illegal when it is, in the opinion of the Court, unjust, and since the case of *Phipps* v. *London and North Western Ry. Co.* (1) the principle has been well settled, that it is not unjust if it is the natural result of, or necessary for, the purposes of fair competition. I use the word "fair" advisedly. The facts of this case have been fully set forth by the learned judge, and I need not repeat them. The real contest turned upon whether the competition was or was not fair. Upon the facts I think it was, and that public advantage has resulted. The applicants, by their steamers from Dublin to Manchester, have carried competing traffic in cattle and stout to certain inland towns in England at lower rates than the same traffic was previously carried by the defendants via Holyhead. The defendants' cross channel rates were Conference rates fixed by the English and Irish Traffic Conference. Finding that they were losing a considerable amount of traffic owing to the applicants' competition, the defendants left the Conference and reduced their rates via Holyhead. They did this by giving rebates to particular customers which they did not enter in their rate-books lest the applicants should know what they were doing. This is clearly a breach of the Traffic Acts and is quite indefensible. The defendants must be enjoined from continuing it.

---

(1) [1892] 2 Q. B. 229.

1912

DUBLIN AND MANCHESTER STEAMSHIP COMPANY v. LONDON AND NORTH WESTERN RAILWAY.

Sir James Woodhouse.

But the question is whether these reduced rates constitute as regards the applicants an undue preference by the defendants of themselves. There can be no doubt that it is in the public interest that these competing routes should be open to traders. The applicants, when they commenced to run their steamers in 1897 by doing so at lower rates, became the aggressors; the defendants followed them by reducing their rates, but not below the same level (except in one instance which has been referred to). If the evidence satisfied me that the action of the defendants was part of a concerted plan or policy to run the applicants off the sea, then I agree that it would be the duty of the Court to consider whether they should not make an order which would prevent it, but I think that the evidence of the applicants themselves disposes of this suggestion, and that it does not justify the intervention asked for. It is said that the railway portion of the through rate from Holyhead to the inland towns is relatively to distance per ton per mile unduly low compared with the rate from Manchester Docks, and that this is evidence in itself of the preference complained of. The applicants, in order to found the complaint, split up the through rate into the sea portion and the land portion, and then compared the land portion of the through rate from Holyhead with the local rate from Manchester to the inland towns. But the answer to this is that the comparisons are not in point. The Manchester rate is a local rate; the Holyhead rate which is compared with it is not a local rate, but a proportion of a through rate, and it has been decided that you cannot compare a local rate with a portion of a through rate for the purpose of establishing a case of undue preference. It was also argued by Mr. Balfour Browne that the applicants were entitled as of right to a differential sea rate in their favour against the defendants because of the longer length of the applicants' sea route; reference was made to the decisions of this Court in certain Irish cases to this effect, but those cases were decided upon the construction of special statutory clauses which on the amalgamation of certain railways in Ireland were enacted for the protection of the interests of competing ports, and preserved their existing differential rates. In my judgment they form no ground for the proposition advanced in this case.

The next point arises upon the proper interpretation of s. 33, sub-s. 5, of the Traffic Act of 1888. Sect. 14 of the Act of 1873 requires a railway company to keep a book at each of their stations showing every rate for the time being in force, charged for the carriage of traffic from that station to any place to which they book, and stating the distance. This Court was empowered also to make an order requiring the railway company to state how much of this rate was for conveyance, and how much for other expenses, and specifying their nature and detail. By the Act of 1888, sub-s. 3 of s. 33, any person interested may require this disintegration of the rate to be furnished by the railway company without resort to the Court. Sect. 28 of the Act of 1888 applied s. 14 of the Act of 1873 to sea vessels owned or controlled by a railway company. Thus at each port the obligation is cast upon a railway company to keep a rate-book giving the same particulars with regard to sea-borne traffic as at each station where traffic originates they are bound to give with regard to land traffic. Then by sub-s. 5 of s. 33 all rate-books which are kept by a railway company at any port in the United Kingdom used by the vessels which carry the sea traffic, shall, besides containing all the rates charged for the sea traffic of the railway company, " state what proportion of any through rate is appropriated to conveyance by sea, distinguishing such proportion from that which is appropriated to conveyance by land on either side of the sea.'' In this case two points have been raised, namely, (1.) what is the nature of the particulars required to be inserted in the rate-book under this sub-section, and (2.) in the case of a through rate must the rate-book at both the outward and inward ports contain the distinguishing information mentioned in this section ?

The object of this section was clearly to enable rival carriers and the public interested in the competition of rival carriers (and who had complained of the monopoly which, by their control of through traffic, the railway companies had obtained of cross channel traffic, to the disadvantage of independent steamers) to ascertain how much of a through rate a railway company was charging for conveyance by sea. In this case the rate-book at Dublin contained the entry: "The sea proportion of rates in this book between Dublin and English stations is represented by a mileage share as for 70 miles of the throughout distance." To all the inland towns to which traffic was carried in the case before us, group rates were in force, and the group distance only was stated. The actual distance was in some instances more and in others less than the group distance disclosed by the book. It was objected that the defendants' note in the rate-book was not a sufficient compliance with the statute, and that it was necessary in the case of every rate that the exact proportions attributable to sea carriage and land carriage respectively should be expressed in specific figures. It was also objected that the statement failed to shew whether the mileage proportions were in respect of the gross rate or only of the balance after deducting harbour dues, cartage, and terminals. I think the rate-book should contain in every instance the actual distance, as well as the group distance, where grouping prevails, but I think it is not necessary to set forth the minute particulars and arithmetical calculations with reference to each rate as contended for by the applicants. I think the real object of the section will be met if the person interested can from inspection of the rate-book reasonably ascertain what are the proportions of each through rate chargeable in respect of conveyance by sea and by land respectively. But to do this the generic note appearing in the rate-book in this case should be amplified, so as to shew, on the face of it, whether the mileage proportions are of the gross rate, and if not, what deductions, and the nature and amount of them, are to be made before calculating the mileage proportion.

With regard to the second point, though, no doubt, the language of the section is ambiguous, I am of opinion it is only necessary to have the particulars required by sub-s. 5 of s. 33 entered in the rate-book kept at the port from which the traffic is dispatched, in like manner as by s. 14 of the Act of 1873 the particulars have to be entered as regards rail-borne traffic at the station only from which the goods are carried. I can see no reason for requiring that in the case of goods sent

1912

DUBLIN AND MANCHESTER STEAMSHIP COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY.

from Dublin to an inland town in England the particulars should be entered not only in the rate-book at the port of Dublin, but also in the rate-book at Holyhead, and I do not believe that this was the intention of the Legislature.

Solicitors for applicants: *Neish, Howell & Haldane.*

Solicitor for defendant company: *C. de J. Andrewes.*

F. O. R.

1914

Feb. 2.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* CADE.

Criminal Law—Obtaining Money by Forged Instrument—Letter asking for Money—Forgery Act, 1913 (3 & 4 *Geo.* 5, *c.* 27), *s.* 7.

The prisoner was indicted under s. 7 of the Forgery Act, 1913, for obtaining certain money by means of "a certain forged instrument to wit a forged request for the payment of one pound." The document in question was a letter purporting to come from, and to be signed by, a man employed by the prosecutor to whom it was addressed. The letter requested the prosecutor to hand to the bearer the sum of 1*l.* which the letter stated was required for the purpose of hiring a machine with which to clear out a drain on premises belonging to the prosecutor:—

Held, that the letter was an "instrument" within the meaning of s. 7. *Reg.* v. *Riley* [1896] 1 Q. B. 309 followed.

CASE stated by the Common Serjeant under the Criminal Appeal Act, 1907, s. 20, sub-s. 4, and the Crown Cases Act, 1848.

The prisoner pleaded guilty at the Central Criminal Court to an indictment charging that he "feloniously did demand receive and obtain certain money to wit the sum of one pound of the monies of Alfred Lazarus of and from the said Alfred Lazarus under upon and by virtue of a certain forged instrument to wit a forged request for the payment of one pound knowing the said forged instrument to be forged and with intent to defraud." The document referred to was a letter purporting to come from and to be signed by John Waller, who was employed by Mr. Lazarus, to whom it was addressed.

The letter was as follows: "Dear Mr. Lazarus, will you send me 1*l.* as to hire a drain machine as the drains in all the yards in Vine Court are stoped up. I am to Busy to call myself so I have sent Bearer the change will be given back when I have taken the machine back. I cannot get one no where unless I pay a deposit of 20*s*. Yours truly J. Waller. The yards are almost flooded and w.c. stoped up."

The prisoner was sentenced to three months' imprisonment in the second division.

The question for the Court was whether the letter was a "forged instrument" within s. 7 of the Forgery Act, 1913 (1): see *Reg.* v. *Riley.* (2)

A. S. Comyns Carr, for the appellant. The letter written by the appellant was not a forged "instrument" within the meaning of s. 7 of the Forgery Act, 1913. That Act is described as an Act to consolidate, simplify, and amend the law relating to forgery. In s. 1 forgery is defined as "the making of a false document," and the word used in all the sections before s. 7 is "document." In s. 7 the word "instrument" is used for the first time, and the inference is that an "instrument" is not the same as, and is less comprehensive than, "document." The word "instrument" means a document of a formal character, such as a document of title to lands or a document which conveys some binding legal effect. This letter had no legal effect; it was a mere request and was not binding on the person to whom it was addressed.

[Lord Reading C.J. referred to the definition of forgery at common law given by Buller J. in *Rex* v. *Coogan.* (3)]

Reg. v. *Riley* (2) is not an authority on the meaning of the word "instrument" in s. 7 of the Act of 1913. That case was decided under s. 38 of the Forgery Act, 1861, and although there is not much difference between the language of s. 7 and s. 38, yet there is so great a difference between the language of the two Acts taken as a whole that the same meaning cannot necessarily be given to the word "instrument" as used in the two sections; for example, in s. 42 of the Act of 1861 (which corresponds with s. 17 of the Act of 1913) the word used is "document," whereas in s. 17 the word is "instrument." In any case the basis of the decision in *Reg.* v. *Riley* (1) was that the document there was one of a business character and constituted a contract. In the present case the letter cannot be regarded as a business document.

---

(1) Forgery Act, 1913 (3 & 4 Geo. 5, c. 27), s. 7: "Every person shall be guilty of felony and on conviction thereof shall be liable to penal servitude for any term not exceeding fourteen years, who, with intent to defraud, demands, receives, or obtains, or causes or procures to be delivered, paid or transferred to any person, or endeavours to receive or obtain or to cause or procure to be delivered, paid or transferred to any person any money, security for money or other property, real or personal:—

"(*a*) under, upon, or by virtue of any forged instrument whatsoever, knowing the same to be forged; . . . ."

(2) [1896] 1 Q. B. 309.

(3) (1787) 1 Leach, 449.

Roome, for the Crown, was not called upon.

The judgment of the COURT (Lord Reading C.J., Ridley and Rowlatt JJ.) was delivered by

LORD READING C.J. In this case the prisoner pleaded guilty to an indictment under s. 7 of the Forgery Act, 1913, which charged him with feloniously demanding and obtaining the sum of one pound upon a forged instrument. The Common Serjeant, being doubtful whether the prisoner could be rightfully convicted of the offence charged, has stated a case in order to raise the point. The Court has derived valuable assistance from the argument of Mr. Comyns Carr on behalf of the prisoner, but the case appears to us to turn entirely on the question whether the word "instrument" in s. 7 of the Forgery Act, 1913, bears the same meaning as the word "instrument" in s. 38 of the Forgery Act, 1861, has been held to bear. If it does, then there is no doubt that the letter sent by the prisoner to the prosecutor was a forged instrument. In *Reg.* v. *Riley* (1) in the Court for the Consideration of Crown Cases Reserved the meaning to be given to the words "any forged or altered instrument whatsoever" was very carefully considered, and it is sufficient to say that, notwithstanding the doubts of Lord Russell of Killowen C.J. and Vaughan Williams J., the opinion of the Court in that case was that a telegram sent by the prisoner to a bookmaker offering a bet on a horse running in a race was a forged instrument within s. 38 of the Act of 1861. That decision is of course binding upon this

(1) [1896] 1 Q. B. 309.

1914

Rex
v.
Cade.

Court. In the present case the document in question was a letter addressed to the prosecutor, purporting to be signed by a man in his employ, asking the prosecutor to send a sum of money to be expended in connection with work required to be done on his property. The document is really a business document; in the words of Wills J. in *Reg.* v. *Riley* (1) it is "a writing which, if accepted and acted upon, would establish a business relation and lead directly to business dealings with another person." If, therefore, the word "instrument" in s. 7 of the Act of 1913 means or includes a business document, this letter was an instrument within the meaning of that section.

But it has been argued very ingeniously that the word "instrument" in s. 7 of the Act of 1913 does not bear the same meaning as in s. 38 of the Act of 1861, because, if the language of other sections of the Act of 1913 is considered, it appears that the words "document" and "instrument" cannot have been intended to bear the same meaning. I desire to say with regard to that argument that the Court is clearly of opinion that this letter is an "instrument" within s. 7, and that we cannot give to the word such an unnecessarily restricted meaning as would confine it to deeds or other documents of title. Therefore, whether we base our decision on *Reg.* v. *Riley* (2), or on the construction of s. 7, we are of opinion that this document was an "instrument" within the meaning of that section, and the answer of the Court to the question raised by the case is that the prisoner did commit the offence laid in the indictment.

Appeal dismissed.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*
Solicitor for the Crown: *Director of Public Prosecutions.*

(1) [1896] 1 Q. B. at p. 322. (2) [1896] 1 Q. B. 309.

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1914
Jan. 26, 27, 30; *Feb.* 3.

DEAN *v.* RUBIAN ART POTTERY, LIMITED.

Employer and Workman — Compensation — Industrial Disease — Gradual Process—Nature of Employment—Burden of Proof—Last Employer—Third Party—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 8.

By s. 8, sub-s. 1, of the Workmen's Compensation Act, 1906, where the death of a workman is caused by an industrial disease "and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment . . . . (*c*) The compensation shall be recoverable from the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due: Provided that— . . . . (ii.) if that employer alleges that the disease was in fact contracted whilst the workman was in the employment of some other employer" he may join him as a party to the arbitration and "(iii.) if the disease is of such a nature as to be contracted by a gradual process, any other employers who during the said twelve months employed the workman in the employment to the nature of which the disease was due" shall be liable to contribute; and by sub-s. 2, "if the workman at or immediately before the date of the disablement or suspension was employed in any process mentioned in the second column of the Third Schedule to this Act, and the disease contracted is the disease in the first column of that schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary."

A workman had worked for W. for several years as a lead worker and had contracted lead poisoning, but had not worked for him within twelve months of his disablement. He worked for R. in a lead process for nine days within twelve months of but not "at or immediately before" his disablement as provided in sub-s. 2. He died of lead poisoning, and his widow applied for compensation:—

Held that, the death not coming within sub-s. 2, there was no presumption that the disease was caused by the last employment; it was not enough for the applicant to prove that her husband had been employed in a lead process within twelve months and that he died of lead poisoning;

it must be shewn that the disease was caused by the last employment; and, on the facts, that the disease had not been contracted in the last employment, and no case had been made against third parties.

APPEAL from an award of the judge of the Stoke-on-Trent County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The deceased workman Thomas Dean had until the middle of the year 1911 been in the regular employment of Messrs. Wileman & Co., of Foley Potteries, for several years as a lead worker. During these years (as was found by the learned county court judge) he contracted lead poisoning, which was a progressive disease and had assumed a chronic character. In May, 1911, he ceased to work regularly for Messrs. Wileman & Co. and became an odd man, and thereafter, although he occasionally did odd jobs for them, he did no work for them in any lead process within twelve months previous to his death.

In March, 1913, he worked for four days for the Rubian Art Pottery, Limited, in a process involving the use of lead, and in April, 1913, for four and a half days ending on the 19th. In May he caught cold, pneumonia supervened, and he died on May 15. The learned judge found as a fact that his death was accelerated by lead poisoning. His widow applied for compensation from the Rubian Art Pottery, Limited, and they brought in Messrs. Wileman & Co. as third parties.

The judge held that the onus was on the applicant to prove that the temporary employment by the Rubian Art Pottery, Limited, had accelerated the death of the deceased and that she had not discharged it; that it was not sufficient for her to prove that her husband had been employed by them within twelve months of his death in a process to the nature of which the disease was due; and he made an award in favour of the respondents and refusing to give her any compensation.

The applicant appealed. The third parties were not at first made parties to the appeal, but were subsequently brought in by direction of the Court of Appeal and appeared by counsel.

Sanderson, K.C., and *A. B. Whitfield*, for the appellant. The county court judge was wrong in holding that, inasmuch as it

C. A.
1914

DEAN
v.
RUBIAN ART
POTTERY,
LIMITED.

was not proved that the disease from which the man died was due to the employment in which he was last engaged, therefore his dependant was not entitled to compensation: *M'Ginn* v. *Udston Coal Co.* (1); *Mallinder* v. *J. Moores & Sons.* (2) The date of disablement in this case is the date of the death: s. 8 (4.) (*b*). The applicant only has to establish that the deceased worked within twelve months in an employment to the nature of which the disease may have been due; she is not required to prove that the disease was in fact contracted in that employment. By s. 8 (1.) (*c*) compensation is recoverable only from the employer who last employed the workman, and any proceeding against former employers must be taken by the last employer. By s. 8 (1.) (*c*) (i.) the last employer can only relieve himself by shewing that he asked the workman for the names and addresses of former employers during the twelve months and that that information has not been furnished. By s. 8 (1.) (*c*) (ii.), if the last employer alleges that the disease was in fact contracted in another employer's service he may join that employer as a party to the arbitration, and, if the allegation is proved, that other employer is to be the employer from whom compensation is recoverable. And by s. 8 (1.) (*c*) (iii.), if the disease is of such a nature as to be contracted by a gradual process, any other employers who during the twelve months employed the workman in the employment to the nature of which the disease was due shall be liable to contribute to the employer from whom compensation is recoverable. There is nothing to shew that the workman has to prove more than that the disease was due to an employment of the same nature as that of the employment in which he has been working. The learned judge held that the disease was not contracted within twelve months previous to the date of disablement and that therefore there was no liability on anybody. It is submitted that that was wrong. Liability does not depend upon whether the disease was in fact contracted in the employment, but whether the nature of the employment was such that it might have been contracted.

---

(1) [1912] S. C. 668; 5 B. W. C. C 559.

(2) [1912] 2 K. B. 124.

[At this stage the case stood over in order that notice might be given to Messrs. Wileman & Co., who agreed to be made parties and thereafter appeared by counsel.]

The applicant is entitled to compensation from the last employers unless they can shift the burden on to former employers. Where as in this case the disease is one contracted by gradual process, the origin of which it is very difficult for the workman to prove, the policy of the Act is to cast the burden of proof on the last employer.

Under s. 8 (2.), if the workman "at or immediately before" the date of disablement was employed in any work likely to cause the disease, the disease is to be deemed to have been due to the nature of that employment, unless the employer proves the contrary. The employer must prove that it could not have been caused by the employment. The learned judge was wrong in holding that the employment in April was not at or immediately before the disablement, i.e., the death. The interval was sufficiently short to make s. 8 (2.) apply and cast the burden on the last employers: *Mallinder* v. *J. Moores & Sons* (1); *Thompson* v. *Gibson*. (2)

F. B. Merriman, for the Rubian Art Pottery. Where a man has only worked at a lead process for eight days in the last twelve months and dies of pneumonia aggravated by lead poisoning his last employer cannot reasonably be held liable to compensate his dependants, although it is admitted that he did die of lead poisoning within the Act. The employment was not "at or immediately before the death": *M'Quaker* v. *Governors of the Ballantrae Educational Trust* (3); so s. 8 (2.) does not apply, and the burden of proving that the disease was due to the employment is on the applicant. It is not enough for her to shew that lead poisoning is due to working at a lead process and that the deceased was working at a lead process. "Due to the nature of the employment" does not mean "due to that sort of employment" but "due to that particular employment" on which he was engaged. It would not be enough for a miner to shew that it was incidental to mining generally that the roof should fall; he must shew that it was a risk incidental to his particular employment. "Due to the nature of the employment" is equivalent to "due to the employment." Employers escape if they shew that owing to precautions taken by them it was impossible to catch the disease. There is no evidence here that his employment for the nine days increased the deceased's lead poisoning: the learned judge found that it did not.

---

(1) [1912] 2 K. B. 124.
(2) (1841) 10 L. J. (Ex.) 241.
(3) (1891) 18 R. 521.

W. Shakespeare, for Messrs. Wileman & Co. We are brought in as third parties and there cannot be an award against us unless there is also an award against the Rubian Art Pottery: Workmen's Compensation Rules, 1913, r. 41. If the learned judge's award stands there can be no award against us. But in any view no order can be made against us, for there is no evidence to support it. We did not employ the deceased within twelve months of his death, and the employers' liability is for twelve months only. There is no evidence that the deceased contracted the disease in our employment.

L. Sanderson, K.C., in reply, admitted that the Rubian Art Pottery had not made out a case against Messrs. Wileman & Co.

[The COURT thereupon dismissed the appeal as against Messrs. Wileman & Co.]

Cur. adv. vult.

Feb. 3. COZENS-HARDY M.R. This appeal raises an important question upon s. 8 of the Act of 1906. That section (1) is

(1) Sect. 8. Application of Act to industrial diseases.

"(1.) Where

"(i.) the certifying surgeon appointed under the Factory and Workshop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act and is thereby disabled from earning full wages at the work at which he was employed; or . . . .

"(iii.) the death of a workman is caused by any such disease;

and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising

C. A.
1914

DEAN
v.
RUBIAN ART
POTTERY,
LIMITED.

Cozens-Hardy
M.R.

probably the most difficult and obscure section in this very exceptional Act.

The main object of the Act is defined in s. 1. It is to make an employer liable for personal injury by accident arising out of and in the course of the employment. The burden of proof rests

---

out of and in the course of that employment, subject to the following modifications:—

"(a) The disablement or suspension shall be treated as the happening of the accident; . . . .

"(c) The compensation shall be recoverable from the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due:

"Provided that—

"(i.) the workman or his dependants if so required shall furnish that employer with such information as to the names and addresses of all the other employers who employed him in the employment during the said twelve months as he or they may possess, and, if such information is not furnished, or is not sufficient to enable that employer to take proceedings under the next following proviso, that employer, upon proving that the disease was not contracted whilst the workman was in his employment, shall not be liable to pay compensation; and

"(ii.) if that employer alleges that the disease was in fact contracted whilst the workman was in the employment of some other employer, and not whilst in his employment, he may join such other employer as a party to the arbitration, and if the allegation is proved that other employer shall be the employer from whom the compensation is to be recoverable; and

"(iii.) if the disease is of such a nature as to be contracted by a gradual process, any other employers, who during the said twelve months employed the workman in the employment to the nature of which the disease was due, shall be liable to make to the employer from whom compensation is recoverable such contributions as, in default of agreement, may be determined in the arbitration under this Act for settling the amount of the compensation.

"(2.) If the workman at or immediately before the date of the disablement or suspension was employed in any process mentioned in the second column of the Third Schedule to this Act, and the disease contracted is the disease in the first column of that schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary."

upon the workman, in which term I include his dependants in case of death. There are provisions for notice of accident and a limitation for the time of making a claim. Questions are to be decided by arbitration in accordance with Sched. II.

It is obvious that, apart from s. 8, the Act had no operation except where there was an accident. Parliament thought fit in 1906 to give workmen a right to compensation where disablement or death is due to certain industrial diseases, of which lead poisoning is one, and s. 8 enacts that the workman shall be entitled to "compensation under this Act" as if the disease were, what it certainly was not, a personal injury by accident arising out of and in the course of the employment. The date of disablement, which is treated as the happening of the accident, is, for the purpose of the present appeal, the date of the workman's death. I can find nothing in the section which exempts the applicant from the necessity of establishing, as he must in every other case establish, to the satisfaction of the county court judge that in fact the accident arose out of and in the course of his employment. The second sub-section seems to me conclusive on this point. It raises certain presumptions in favour of the workman. If the workman "at or immediately before" the death was employed in a lead process, there is a presumption that death was due to the nature of the employment unless one of two things happens: (*a*) the certifying surgeon certifies that in his opinion the disease was not due to the employment, (*b*) or the employer proves the contrary.

If the case does not fall within sub-s. 2 because the employment was not "at or immediately before" the death, the workman must proceed under sub-s. 1 and give such evidence as the circumstances admit. The right of the employer to negative his liability is also clearly shewn by sub-s. 1 (iii.) (*c*) (ii.), although the present case does not fall within that particular sub-section.

It has, however, been urged by counsel for the appellant that it is sufficient for the applicant to establish that during the twelve months previous to the death the man was employed in a lead process, for however short a time and however long before the death, and that it makes no difference that the county court judge has found as a fact that the disease was contracted long

C. A.
1914

Dean
v.
Rubian Art
Pottery,
Limited.

Cozens-Hardy
M.R.

ago, and has not found that the disease was aggravated or the death was accelerated by anything that happened during his last employment. I am unable to accept this contention. It seems to me to be inconsistent with both the general scheme of the Act and the express language of s. 8.

The facts of the present case may be shortly stated. Thomas Dean died on May 15, 1913. He worked for the respondents in a process involving the use of lead for four days and four and a half days, the last of which expired on April 19. With that exception he had not worked in any lead process for twelve months before his death. But for many years prior to that he had regularly worked in different processes involving the use of lead with other firms. He had contracted lead poisoning of long standing. His death was due immediately to pneumonia, but the lead poisoning had so seriously affected his heart that his death was in fact caused by lead poisoning.

His Honour Judge Ruegg has held, and I agree, that April 19 was not "at or immediately before" May 15, so that sub-s. 2 does not raise any presumption in favour of the applicant. He also held, and there was abundant evidence to justify this, that the lead poisoning was not contracted during his employment by the respondents. There was evidence for and against the view that the eight and a half days during which he was employed by the respondents might have accelerated his death, or have had some influence upon the disease. His Honour held that the applicant had not satisfied him of the affirmative of this proposition, and we cannot interfere with this finding. In my opinion the decision of the learned judge was correct. If the last of the eight and a half days had been May 13, so that sub-s. 2 would have applied in favour of the applicant, I think it is clear that the respondents could have proved that which they have proved here, namely, that the disease was not due to the nature of the employment, by which I understand the nature of the particular employment with the respondents. I cannot believe that he has been deprived of any such rights in a case where there is no presumption in favour of the workman.

The appeal must be dismissed with costs, including the costs of Mr. Shakespeare's clients.

C. A.
1914

DEAN
v.
RUBIAN ART
POTTERY,
LIMITED.

SIR SAMUEL EVANS, PRESIDENT. This case is now free from any question as to the liability of any third parties. The sole question that remains is whether the respondents are liable to pay compensation to the applicant as a dependant of the deceased workman in respect of his death. To avoid any confusion or complication from the supervening of pneumonia, the deceased must be taken for the purposes of this decision to have died of lead poisoning, which is one of the scheduled industrial diseases.

Sect. 8, which brings within the Act (inter alia) deaths from the scheduled industrial diseases, as if they were "personal injuries by accident arising out of and in the course of the employment," is complicated and artificial. No safe guidance or assistance in the construction of such a section is afforded by a consideration of hardships which may seem to be inflicted either upon employers or workmen in any given set of circumstances by the application of the law which the section enacts.

The material facts are within a narrow compass. The deceased died of a scheduled disease, namely, lead poisoning. This disease, in the words of proviso (iii.) of s. 8, sub-s. 1, is "of such a nature as to be contracted by a gradual process." The gradual process began, and therefore the disease in its origin was contracted many years ago under employers other than the respondents. During the whole of 1912, and for many months before, the deceased did not work in "any process involving the use of lead, or its preparations, or compounds." During 1913—up to May 6, when he ceased to work—he had been employed under employers other than the respondents in casual work not involving any use of lead, &c., with the exception of two short spells of a few days each. These two short spells were from March 12 to 15 inclusive (four days) and from April 14 to 18 inclusive (four and a half days), and for these days he worked under the respondents in a lead process. He ceased working on May 6. A doctor was called in on May 10, and found him suffering from pneumonia. He died on May 15.

One other circumstance which must now be taken as a fact, owing to the finding of the county court judge, is that there was no proof that any lead poisoning had been caused during the two short spells when the deceased was in the employ of the respondents. It was contended for the applicant that, by reason of the employment of the deceased under the respondents in a lead process during the eight and a half days referred to, the respondents were liable to pay compensation, as his last employers within twelve months, under the Act. The argument of counsel for the applicant was put upon two grounds: first, that by virtue of sub-s. 2, read with sub-s. 4 (*b*) of s. 8, the disease must be deemed to have been due to the nature of the employment under the respondents, and that they had not proved the contrary; and, secondly, that by virtue of sub-s. 1 of the same section the disease was due to the nature of the employment under the respondents within twelve months of the death, in the sense that such employment was in a lead process, and the disease was due to an employment of that nature or kind, whether or not lead poisoning was in fact caused in that employment. As to the first ground, the matter depends upon onus of proof. Where all the facts are before a tribunal, I think decisions proceeding simply upon questions of onus probandi are not very satisfactory. But the sub-section must be construed and applied. Under it, read with sub-s. 4 (*b*), the "date of disablement" in this case was the "date of death." Was the deceased workman employed by respondents in the lead process "at or immediately before" the date of death? The dates of such employment have been stated, namely, March 12 to 15 (followed by an interval of a month at other employments elsewhere), and April 14 to 18 (followed before death by an interval of a lunar month, and by employment of other kinds elsewhere for between a fortnight and three weeks).

The learned county court judge in these circumstances held that sub-s. 2 did not avail the applicant. In my opinion he was right. Immediately before the death the deceased was not in the employ of the respondents, but was in the employ of other masters at other work. The presumption in favour of the applicant conferred by the Act accordingly disappeared, and the respondents were not called upon to rebut it.

The applicant had therefore to prove her case affirmatively without the aid of any legal presumption.

This brings forward the applicant's counsel's second ground; and the question is, Did the applicant prove enough to entitle her to compensation by shewing that the employment under the respondents was one of the nature or kind in which lead poisoning is or may be caused or produced, whether it was in fact caused or produced in the respondents' employment or not.

The finding of the judge in the Court below is conclusive that the applicant did not prove that the employment under the respondents produced any lead poisoning in fact. It requires clear words in such a case to impose a legal liability upon the respondents to make compensation for injuries which they did not in fact cause in any degree. Did the applicant, within the meaning of sub-s. 1, prove that the disease from which the deceased died was "due to the nature of any employment in which he was employed at any time within the twelve months previous to the date of death"? In other words, translated to the facts of this case, Did they prove that the disease was due to the nature of the employment under the respondents? If it was not due to such employment, it is difficult to see how it could be due to the nature of such employment. In sub-s. 2 the presumption where it exists is that "the disease . . . . shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary." The phrase "due to the nature of" is the same. The employer is therefore entitled to prove, if he can, that the disease was not in any degree due to the nature of the employment under him. This must mean that it was not caused by or produced in his employment. Apart from such proof the presumption would be that the disease was caused by or produced in, and therefore due to, the employment under him. I think, therefore, that those words in that sub-section "due to the nature of the employment" mean no more than "due to the employment." I think the same meaning must be attached to them in sub-s. 1. If the employer is allowed to prove that the disease was not caused wholly or in part in his employment in order to rebut a legal presumption against him, it would seem clearly to follow that he is entitled, under sub-s. 1, to demand that the applicant,

C. A.
1914

DEAN
v.
RUBIAN ART
POTTERY,
LIMITED.

The President.

in the absence of the presumption in her favour, should prove that it was so caused. To sum up: It is not enough, in my opinion, under sub-s. 1 to adduce proof, for example, that mercury poisoning, or arsenic poisoning, is due to the nature of a process involving the use of mercury, or of arsenic, in which a person might have been employed during the previous twelve months; but it must also be proved that the poisoning was due not necessarily at all wholly, but in part, to the employment itself in which the workman had been so employed, before compensation can be recovered. What the applicant proved has been stated. She failed to prove that the lead poisoning from which the deceased suffered was even in part caused in the respondents' employment, or, as I have construed the words, was even in part due to the nature of the employment under the respondents.

In my judgment, therefore, her claim under the Act was not established, and the appeal must be dismissed.

Eve J. Thomas Dean, whose widow is his sole dependant and the appellant herein, died on May 15, 1913. For two short periods of four days and four and a half days respectively during the twelve months preceding his death the deceased had worked for the respondents in a process involving the use of lead. With these exceptions, and possibly one other not amounting in time to more than half a day, the deceased had not worked in a process involving the use of lead for two years before his death. Prior to these two years he had worked for several years in different processes involving the use of lead, and in so doing had contracted lead poisoning. The last of the two short periods for which he worked for the respondents expired on April 19.

The immediate cause of his death was pneumonia, but the lead poisoning of long standing had so seriously affected his heart that death was in fact caused by lead poisoning within the meaning of s. 8, sub-s. 1 (iii.), of the Act.

On these facts it is contended on the applicant's behalf that the case is brought within sub-s. 2 of s. 8, and that a presumption being thereby raised that the disease was due to the employment by the respondents, the burden is cast upon them of rebutting that presumption.

The learned county court judge has taken the view that the applicant has not brought the case within sub-s. 2, and I agree with him.

The date of the disablement here is the date of the death (sub-s. 4 (*b*)), May 15, and whether the words in sub-s. 2 "at or immediately before" are to be read as applicable both to the date of the disablement and suspension, or whether, as seems to me quite reasonable, the sub-section should be read as though it ran "If the workman at the date of the disablement or immediately before suspension was employed," &c., I cannot bring myself to hold that the employment in this case, which terminated on April 19, can be said to have been employment "at or immediately before" May 15.

I think the county court judge was quite right in holding that the applicant's rights fall to be determined under sub-s. 1 and not under sub-s. 2.

Before turning to sub-s. 1, I desire to emphasize the fact that even in a case coming within sub-s. 2 it is only a presumption which is raised, and in my opinion it is open to the employer to rebut that presumption by any available evidence. He may prove, if he can, that the disease was not "due to the nature of that employment." What is that employment? Obviously the employment in which the workman was employed at or immediately before the disablement. This seems to me to shew that in a case falling within sub-s. 2 the employer may rebut the presumption raised in favour of the workman or his dependants bringing himself or themselves within the sub-section, by proving that the disease was not due to the particular employment in the disease-producing process in which the workman was employed at or immediately before the date of the disablement.

This conclusion assists greatly in the construction of sub-s. 1. It has been argued on behalf of the applicant that inasmuch as under that sub-section we have two things proved—the one, the death of the workman caused by lead poisoning, and the other, his employment by the respondents within twelve months previous to his death in a process involving the use of lead—the right to compensation from the respondents follows unless they can avoid or mitigate their liability under one or other of the provisoes to paragraph (*c*) of sub-s. 1.

If this be sound, and if my construction of sub-s. 2 be right, this extraordinary result follows—that, whereas in cases where the proximity of employment and death raises a presumption in favour of the workman, the employer can give evidence rebutting the presumption, and proving that the disease was not due to the particular employment at or immediately before the death, yet in cases where no presumption in favour of the workman arises the employer is precluded from proving that there is no connection between the particular employment by him and the disease from which the man died. Indeed counsel went so far as to submit, in answer to a question put to him by the Bench, that under sub-s. 1 an employer could not escape liability even if he were in a position to prove to demonstration that in consequence of precautionary measures adopted in his works the disease could not be due to the particular employment, if once it had been proved that the workman's death was caused by the disease, and that he had been employed within the preceding twelve months in an employment to the nature of which the disease was due.

In my opinion, the imposing of such a construction on sub-s. 1 brings about a result which is so inconsistent with sub-s. 2, and so manifestly unjust, as to be well nigh impossible, and I do not think we ought to accede to the arguments urged on behalf of the appellant on this point. I think under both sub-ss. 1 and 2 it is open to the employer to prove, if he can, that the disease from which the man died was not due to the particular employment by him, but of course his position otherwise under the two subsections is essentially different. In cases coming under sub-s. 2 it is on him to rebut the presumption which the facts raise in favour of the workman. In cases coming under sub-s. 1 there is no presumption either way, and it is for the workman or his dependants to prove his or their case.

The present, as I have already said, is a case coming within sub-s. 1. The learned county court judge has arrived at th conclusion that the applicant has failed to prove her case. There was material to support that conclusion, and in my opinion it is impossible for us to dissent from it. I think the appeal fails

C. A.
1914

DEAN
v.
RUBIAN ART POTTERY, LIMITED.

and ought to be dismissed with costs, including the costs of Mr. Shakespeare's clients.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co., for Ernest A. Patterson, Longton; Milner & Bickford, for Wain & Harris, Burslem; M. A. Orgill, for Llewellyn & Son, Tunstall.*

H. C. R.

[IN THE COURT OF APPEAL.]

C. A.
1914
Jan. 30.

MARTIN *v.* J. LOVIBOND & SONS, LIMITED.

Employer and Workman—Injury by Accident—Arising "out of and in the course of" the Employment—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A brewers' drayman, whose duty it was from 8 in the morning till 8 in the evening to drive round a certain district in London a pair of horses in a dray belonging to his employers for the purpose of obtaining orders for and delivering beer to their customers, at about 2 o'clock in the afternoon left his dray at the side of the road opposite to a public-house, to which he went to get a glass of beer. After an absence of about two minutes he left the public-house to return to his dray, and while crossing the road was knocked down by a motor car, receiving injuries which resulted in his death. Upon a claim by his dependants for compensation under the Workmen's Compensation Act, 1906:—

Held, that there was no break in the employment; that what the man did was reasonably incident to his employment; that he was exceptionally exposed to street accidents; that the accident therefore arose out of and in the course of the employment; and that the dependants were consequently entitled to compensation.

Appeal from an award of the judge of the West London (Brompton) County Court sitting as an arbitrator under the Workmen's Compensation Act, 1906.

The applicant was one of the dependants of a brewers' drayman who was accidentally killed in the service of the respondents. His duties were from 8 in the morning till 8 in the evening. During that time he was in charge of a dray and pair of horses and engaged in delivering and obtaining orders for beer. At about 2 o'clock in the afternoon on the day of the accident he

C. A.
1914

MARTIN
v.
J. LOVIBOND
& SONS,
LIMITED.

drew up his dray on the proper side of the road, and leaving it there crossed over the road to a public-house on the opposite side for the purpose of getting a glass of beer. He was only away two minutes, but in crossing back from the public-house to his dray he was knocked down by a motor car and killed.

The county court judge in his judgment said that, on the facts proved as to the employment of the deceased, it was a necessary incident of his employment, which took him away from his home and his employers' place of business for twelve hours or more, that he should in the course of the day leave his dray when on his round for the purpose of getting reasonable refreshment. As was said by Collins M.R. in *Morris* v. *Lambeth Borough Council* (1), "As a workman he required and had a right to take adequate food . . . . and he might do so on any part of the premises if it was not inconsistent with the performance of his duties." "Adequate food" must include "drink"; and in the case of a workman employed as the deceased was in this case the phrase "any part of the premises" must be held to include any suitable place in the district in which his duties required him to be, unless he was prohibited from resorting to such place. But it was not suggested that there was any such prohibition in this case, and the deceased was entitled to get reasonable refreshment in the course of his work at any suitable place on his round, and his interrupting his work and leaving his dray for a few minutes for that purpose did not constitute a break in his employment or destroy the nexus between him and his employers. The learned judge thought that the man was entitled to do so by virtue of his contract of employment, and that in doing so at a place where he would, as admitted, properly be in the course of his work he did not cause a break in his employment, but was still in the course thereof notwithstanding that, and not because he was getting reasonable refreshment. No doubt he was bound to make a reasonable use of the facilities and rights given to him in this way, but it was not unreasonable for him to draw up his dray on the opposite side of the road (which was his near side in the direction in which he was going) and cross to the public-house, more especially as there was, as appeared by the evidence, another vehicle drawn

---

(1) (1905) 22 Times L. R. 22.

C. A.
1914

MARTIN
v.
J. LOVIBOND
& SONS,
LIMITED.

up on the public-house side. The learned judge held therefore on the facts of this case that the deceased was doing what he was reasonably entitled to do in the course of his employment when he met with the accident, and that it arose out of and in the course of his employment, and he made an award in favour of the applicant for 226*l.* 4*s.*

The employers appealed.

Rigby Swift, K.C., and *A. H. Richardson*, for the appellants. At the time of the accident the man had gone outside the sphere of his employment, so that the accident did not arise in the course of the employment. There is no difference between this case and that of a sailor employed on a ship or a workman in a factory. If the accident had happened while the man was drinking his beer in the public-house it could not have been successfully argued that it arose in the course of the employment. Again, it did not arise out of the employment. What the man was doing was not reasonably incident to the employment. The risk of being knocked down by a motor car was not necessarily incidental to the employment of the man as a brewers' drayman. He was only incurring one of the ordinary risks which every one runs who uses the public streets: *Pierce* v. *Provident Clothing and Supply Co.* (1); *Kitchenham* v. *Owners of S.S. Johannesburg* (2); *Parker* v. *Ship Black Rock* (3); *Fletcher* v. *Owners of Ship Duchess* (4); *Gilbert* v. *Owners of Steam Trawler Nizam* (5); *Low* v. *General Steam Fishing Co.* (6); *Cogdon* v. *Sunderland Gas Co.* (7); *Biggart* v. *Owners of S.S. Minnesota* (8); *Everitt* v. *Eastaff & Co.* (9); *McCabe* v. *Henry North & Sons.* (10)

Disturnal K.C., and *J. P. Oliver*, for the respondent, were not called upon.

Cozens-Hardy M.R. In this case the learned county court judge, a judge of very great experience, has held that the

---

(1) [1911] 1 K. B. 997.
(2) [1911] 1 K. B. 523; [1911] A. C. 417.
(3) [1914] W. N. 43.
(4) [1911] A. C. 671.
(5) [1910] 2 K. B. 555.
(6) [1909] A. C. 523.
(7) (1907) 1 B. W. C. C. 156.
(8) (1911) 5 B. W. C. C. 68.
(9) (1913) 6 B. W. C. C. 184.
(10) (1913) 6 B. W. C. C. 504.

C. A.
1914

MARTIN
v.
J. LOVIBOND
& SONS,
LIMITED.

Cozens-Hardy
M.R.

dependants of a deceased drayman are entitled to compensation. In these cases it is necessary to consider the nature of the employment, the obligations of the man with reference to his employment, and all the circumstances, before one can arrive at a conclusion. The man was a drayman. His duties were from 8 in the morning till 8 in the evening. All that time he was going round for his employers, who were brewers, not merely to deliver beer at the public-houses tied to the brewers' firm, but also to deliver bottled beer and other things to private customers, to obtain orders for beer and everything of that kind. He was going his round; the learned judge finds as a fact that he was in the particular street where this accident happened; he was there with his dray in the course of going his round. He was not deviating in any way from his duty. It was about 2 o'clock in the afternoon. What is the position of a man who cannot go home for his meals, who is bound to be away from his home from 8 in the morning till 8 in the evening, and whose business keeps him during all that time more or less constantly in the streets? This man pulled up his dray on the proper side of the road, crossed to a public-house, not to linger there at all, but for the purpose of getting a glass of beer. He had a glass of beer there, he was only away two minutes, and in crossing back from the public-house to the dray he was knocked down by a motor car.

In the first place, it is said that this accident did not arise in the course of his employment. I entirely fail to understand that. I do not think there was any breach or break in the course of his employment. I shrink from saying that a man who was away from home, and necessarily away from home, for twelve hours is guilty of breaking the course of his employment because he gets off the dray for necessary purposes. As I put it during the course of the argument, supposing he had stopped to give the horses some water, could it be said that that was not in the course of his employment? I feel great difficulty in seeing that under circumstances like these the driver of the dray is not equally entitled to procure reasonable liquid refreshment for himself, not deviating from the course of his route, not lingering in the public-house, but simply going in and getting a glass of beer as in this case, and returning at once to his dray. I therefore think that there was no breach of the course of his employment, and that the accident did happen in the course of his employment.

Then it is said, and in truth, that the accident must arise not merely "in the course of" but "out of the employment," and that this man was no more exposed to the risk of being knocked down by a motor car than any other member of the public. I cannot assent to that. His duties as a drayman involved his being from 8 in the morning till 8 at night more or less actually in the streets of London, spending his life in the streets of London. It seems to me to bear the strictest possible analogy to the bicycle case —*Pierce* v. *Provident Clothing and Supply Co.* (1)—where we held that a man who is exceptionally exposed to street accidents is entitled to claim in respect of such an accident as arising out of his employment, although an ordinary member of the public not so exceptionally exposed would not be so entitled.

The learned judge held that what the man did was not only in the course of his employment, but was done perfectly reasonably —not unreasonably in any way. He has held that what he did was really done in order to enable him to better discharge his duties as a drayman for his employers. I hold that there is no ground for differing from his decision.

SIR SAMUEL EVANS, PRESIDENT. I agree. As Lord Loreburn said in one of the cases in the House of Lords, the more one sees of these cases under the Workmen's Compensation Act, the more one feels that all of them are in reality pure questions of fact, with regard to which the only function of the Court is to interpose when there is no evidence in support of a particular finding.

The facts here are few and simple, and I will not repeat them. I will only emphasize that the evidence before the learned county court judge and the finding of the learned judge were that this man was at his work for twelve hours or more, and further that during those twelve hours he was away from his home and his place of business. He had no eating or resting place except on his dray. On the day in question he goes to the public-house, not as a loafer, or as a lounger, or a man addicted to drink, but for the purpose of refreshing himself with one glass of beer, and the whole period of his absence, including the time taken up in ordering the refreshment and its consumption, the learned judge says was only two minutes. It is said that the accident that occurred to this man while going back to his dray did not arise out of or in the course of his employment. Personally, I am very glad that the learned judge has found that what he did was a reasonable incident of his employment. In my opinion he was justified in so finding. If he had found that there was an implied term in his contract of service that the man should be allowed to take refreshment in this way during the twelve hours, I think no Court would have disturbed his finding. The learned judge was amply justified in coming to the conclusion that the accident to the deceased, in the circumstances, arose out of and in the course of his employment. The appeal therefore fails.

---

(1) [1911] 1 K. B. 997.

EVE J. I concur. The employment in this case was of a character which I think may be properly defined as continuous and peripatetic. It was an employment in which the workman was exceptionally exposed to street accidents. The peripatetic character of the employment made the accident one "arising out of the employment," and its continuity made it one "arising in the course of the employment." I think the learned judge was quite right.

Appeal dismissed.

Solicitors for appellants: *Hair & Co.*
Solicitor for respondent: *J. E. Cooney.*

G. A. S

BAILEY *v.* THE INSURANCE SECTION OF THE CO-OPERATIVE WHOLESALE SOCIETY, LIMITED AND ANOTHER.

1914
Feb. 5, 6.

Insurance (Health)—Sickness Benefit—Rule of Approved Society requiring "medical certificate or other sufficient evidence of incapacity and the cause thereof"—Right to Sickness Benefit dependent upon Incapacity for Work "by some specific disease or by bodily or mental disablement"—Medical Certificate that Member suffering from "Debility"—Sufficiency of Certificate—Dispute between Member and Society—National Insurance Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 55), *ss.* 8, 14, 67.

The rules of an approved society under the National Insurance Act, 1911, provided, with regard to sickness and disablement benefits, that "an illness shall not be deemed to commence or continue unless the member is rendered incapable of work by some specific disease or by bodily or mental disablement," and that "an insured member shall send notice of illness to the local secretary of the society . . . . and shall not be entitled to sickness benefit until he has sent to the local secretary . . . . a medical certificate or other sufficient evidence of incapacity and the cause thereof." A further rule provided that disputes arising between an insured member and the society should be decided by the general delegates' meeting.

The plaintiff, a member of the society, sent in a claim for sickness benefit accompanied by a medical certificate which stated that she was "suffering from debility and unable to work." The society requested that the certificate should be amended by the cause of the debility being stated, and as this request was not complied with the society refused to pay the plaintiff sickness benefit. The plaintiff thereupon sued the society, claiming, first, an injunction to restrain them from refusing to accept and consider as evidence of her claim to sickness benefit the medical certificate she had sent, and, secondly, a sum in respect of sickness benefit:—

Held, that the Court had no jurisdiction to entertain the action inasmuch as the matter was a dispute within s. 67 of the National Insurance Act, 1911, and must be decided by the tribunal set up by the society's rules.

Heard v. *Pickthorne* [1913] 3 K. B. 299 distinguished.

Appeal from a decision of the deputy judge of the Leicester County Court.

The plaintiff, a married woman, was a member of the national insurance section of the defendant society, which was an approved

1914

BAILEY
v.
CO-OPERATIVE
WHOLESALE
SOCIETY
(INSURANCE
SECTION).

society under the National Insurance Act, 1911, and she had agreed to be bound by the defendants' rules. On April 21, 1913, she sent a notice to the defendants stating that she was sick and in consequence unable to work, and claiming sickness benefit. Along with her notice she sent a medical certificate of the same date, which was in the following terms: "Having examined the above named claimant, I hereby certify that she is suffering from debility and unable to work."

This claim and certificate were sent to the defendants' head office in Manchester, and on April 23, 1913, the Leicester branch wrote to the plaintiff requesting "that the specific form of the nature of 'debility' be stated on the certificate," and requesting her to ask the doctor to specify this. On June 3 the plaintiff wrote to the defendants' head office complaining that she had not received sickness benefit, and on June 9 the defendants wrote in reply as follows: "With reference to your letter of the 3rd instant, we have to say that the reason why benefit has not been paid is because the medical certificate does not state the specific disease as required by our rules, and until such is done we cannot entertain your claim. Kindly ask your doctor to state specifically the disease and then forward to us your claim through the local co-operative stores when the same shall have immediate attention." Further correspondence took place in the course of which the defendants said: "We cannot possibly accept such a certificate as this is not in accordance with the Act of Parliament or our authorised rules, which require that the term (*sic*) should not only state the specific disease or bodily or mental disablement causing the incapacity, but give some indication of the cause thereof. Simply meaning 'lack or loss of strength' debility gives no such indication of the cause. It is indeed not a cause but an effect and it is obvious that we must know from what cause it arises, as if in consequence of a course of vicious excesses we should be debarred by our rules from any payment of benefit. You will see therefore that a general term like debility cannot be accepted by an approved society because it cannot by any stretch of imagination be called a specific disease for which only sickness benefit can be paid . . . . Immediately the doctor will amend the certificate, the benefit to which Mrs. Bailey is entitled

1914

BAILEY v. CO-OPERATIVE WHOLESALE SOCIETY (INSURANCE SECTION).

shall be paid, but we cannot make any payment contrary to the rules and regulations, to which we have to conform." The doctor who signed the certificate in question wrote to the defendants on the matter and said: "I am willing to meet you by adding the words 'not due to misconduct' to my diagnosis. If this does not suffice I shall be compelled to advise my patient to sue you in the county court where I am afraid your defence will carry but little weight." Some further correspondence took place, and the plaintiff then sued the defendants in the county court, her claim being "for an injunction to restrain the defendants from refusing to accept from the plaintiff and consider as evidence of her claim to sickness benefit under the National Insurance Act, 1911, s. 8, sub-s. 1 (*c*), a medical certificate stating that she was suffering from debility, the ground of such refusal being that such medical certificate does not state that the plaintiff is suffering from any specific disease. And the plaintiff further claims the sum of 1*l.* 2*s.* 6*d.* in respect of sickness benefit under the National Insurance Act, 1911, for the period of three weeks from April 24, 1913, to May 15, 1913."

At the hearing the defendants contended that the Court had no jurisdiction to try the action, as the matter in dispute fell to be decided by the general delegates' meeting in accordance with their rules.

The defendants' rules, which had been duly approved, were, so far as material, as follows:—

Rule 11, which dealt with sickness and disablement benefit, provided by clause 3 that "An illness shall not be deemed to commence or continue unless the member is rendered incapable of work by some specific disease or by bodily or mental disablement." Clause 5 of the same rule was in these terms: "An insured member shall send notice of illness to the local secretary of the society on the form to be obtained from him as soon as possible after the commencement of the illness, whether he is entitled to claim benefit in respect of the illness or not, and shall not be entitled to sickness benefit until he has sent to the local secretary a declaration of incapacity for work in a form to be obtained from him, and a medical certificate or other sufficient evidence of incapacity and the cause thereof.

Rule 37 was as follows:—

"1. If any dispute shall arise between an insured member or a person who has ceased to be an insured member, or person claiming through such member or person, or under the rules, and the section, or the committee of management or any officer of the section, it shall be decided by the general delegates' meeting whose decision shall be final, unless appeal is allowed to the Commission by their regulations.

"2. Any party to such a dispute arising under the Act may, in such cases and in such manner as the Commission prescribe, appeal from such decision to the Commission."

The deputy county court judge held that the case was not distinguishable from *Heard* v. *Pickthorne* (1), that the defendants in refusing to accept the medical certificate sent to them by the plaintiffs were acting ultra vires, and therefore that the Court had jurisdiction to entertain the action. He accordingly heard the case and granted the injunction claimed and gave judgment for two weeks' sickness benefit.

The defendants appealed.

G. Wightman Powers, for the defendants. By s. 8, sub-s. 1 (*c*), of the National Insurance Act, 1911, an insured person is entitled to "periodical payments whilst rendered incapable of work by some specific disease or by bodily or mental disablement, of which notice has been given." By s. 14, sub-s. 1, in the case of insured persons who are members of an approved society, the administration of benefits is by the society or a branch thereof, and by sub-s. 2 it is enacted that "an approved society may, with the consent of the Insurance Commissioners, provide for the application of its existing rules or make new rules with regard to the manner and time of paying or distributing, and mode of calculating, benefits, suspension of benefits, notices and proof of disease or disablement . . . ." Sect. 67, sub-s. 1, provides that, subject to certain exceptions not applicable to the present case, "every dispute between (*a*) an approved society or a branch thereof and an insured person who is a member of such society or branch or any person claiming through him . . . . relating

(1) [1913] 3 K. B. 299.

to anything done or omitted by such person, society, or branch (as the case may be) under this Part of this Act or any regulation made thereunder, shall be decided in accordance with the rules of the society, but any party to such dispute may, in such cases and in such manner as may be prescribed, appeal from such decision to the Insurance Commissioners." In this case the dispute is whether sickness benefit is payable to the plaintiff. The defendants contend that the medical certificate sent in by the plaintiff does not comply with their rules, but, whether they are right or wrong in that contention, the dispute is as to the construction of their rules, and that is a matter to be decided by the domestic tribunal set up by rule 37, and by that tribunal alone, subject to an appeal to the Insurance Commissioners. The county court had therefore no jurisdiction to entertain the action. The position is the same as under s. 68, sub-s. 1, of the Friendly Societies Act, 1896, which enacts that "every dispute between (*a*) a member . . . . and the society or branch or an officer thereof . . . . shall be decided in manner directed by the rules of the society or branch, and the decision so given shall be binding and conclusive on all parties without appeal, and shall not be removable into any Court of law or restrainable by injunction . . . ." Upon that section it was held in *In re Hogg, Ex parte Parkin* (1) that a writ of prohibition should issue to the county court in which a member of a friendly society sought to sue the society for sick pay. Phillimore J. there said: "Facts were in dispute between the parties, and where that was the case arbitration was necessary." In the later case of *Catt* v. *Wood* (2) it was again laid down that questions about sick pay were disputes within the section and therefore could be decided only in the manner directed by the rules of the society. In this case the deputy county court judge misread the decision in *Heard* v. *Pickthorne*. (3) That was not an action claiming sickness benefit, but was a claim for a declaration that a certain resolution passed by the society requiring in every instance a certificate from a panel doctor to be sent by a member claiming sickness benefit was

(1) (1898) 14 Times L. R. 210.
(2) [1910] A. C. 404.
(3) [1913] 3 K. B. 299.

ultra vires. The Court of Appeal held in that case that the resolution was ultra vires as the society could not limit the evidence of incapacity to certificates by panel doctors.

A. S. Comyns Carr, for the plaintiff. The defendants by saying that they cannot and will not pay sickness benefit on a medical certificate in the form sent in by the plaintiff have assumed to act upon a general rule which is ultra vires and which is wholly inconsistent with the National Insurance Act, 1911. Sect. 8, sub-s. 1 (*c*), of that Act says that an insured person is entitled to periodical payments whilst rendered incapable of work " by some specific disease or by bodily or mental disablement." The words " bodily or mental disablement" were inserted to meet a case like this where medical science is for the time being unable to state what the specific disease causing the disablement is. Neither the Act nor the society's rules require the cause of the disablement to be stated. If the defendants considered each individual case on its merits they would be acting within their jurisdiction, but they have laid down a general rule in virtue of which they have refused to entertain the plaintiff's claim, and by so doing they went beyond their jurisdiction. They have limited the class or kind of evidence, precisely in the same way as the society did in *Heard* v. *Pickthorne*.(1) That decision governs the present case, and the Court therefore will interfere. The cases decided on the Friendly Societies Act, 1896, are not in point. That Act did not of itself confer upon members of a society any right to benefits; the right to benefits depended upon the society's rules. The National Insurance Act, 1911, on the other hand, gives a specific right to benefits and makes approved societies merely the administrators of the funds. Moreover, the county court clearly had jurisdiction to entertain this action by virtue of the claim for an injunction. That was the primary claim, the claim for sickness benefit being subsidiary thereto.

RIDLEY J. I am of opinion that the deputy county court judge was wrong in holding that this case was indistinguishable from *Heard* v. *Pickthorne*. (1) This case appears to me to be the very converse of that.

(1) [1913] 3 K. B. 299.

The National Insurance Act, 1911, confers sickness benefits and others. It also recognizes societies as approved societies. The Act, after providing that one of the benefits to which insured persons are entitled is payment "whilst rendered incapable of work by some specific disease or by bodily or mental disablement" (s. 8, sub-s. 1 (*c*)), goes on to enact by s. 67, sub-s. 1, that subject to certain exceptions (not material to this case) "every dispute between (*a*) an approved society or a branch thereof and an insured person who is a member of such society or branch or any person claiming through him . . . . relating to anything done or omitted by such person, society, or branch (as the case may be) under this Part of this Act or any regulation made thereunder, shall be decided in accordance with the rules of the society, but any party to such dispute may, in such cases and in such manner as may be prescribed, appeal from such decision to the Insurance Commissioners." That is a general provision that any dispute arising between a member of the society relating to anything done or omitted by the society shall be decided in accordance with the society's rules. A dispute therefore as to whether benefits are rightly claimed by a member, or whether a specific disease has come about which has rendered the member incapable of work, or whether he is rendered incapable of work by bodily or mental disablement, is referred for decision according to the rules of the society; and I do not think that any rules which deal with the benefits conferred or confirmed by the Act will be found to be in any material respect different from the rules of friendly societies which have been on various occasions the subject of decision. In the one case the friendly societies gave the benefits, and in the other the Act of 1911 gives them; in each case it is provided that the decision of disputes is to be subject to the rules of the society. What was done in *Heard* v. *Pickthorne* (1) was this: the society in question, instead of deciding each matter as it arose, said they would not entertain a claim unless it was accompanied by the certificate of a panel doctor, and the Court of Appeal decided that in so doing they went beyond their jurisdiction. What was done there was a totally different thing from what took place in this case. It is not true to

(1) [1913] 3 K. B. 299.

say that the society in this case rejected the consideration of the matter altogether. What they did was to point out that the Act spoke of "specific disease" and "bodily or mental disablement," and their rule 11, clause 3, provided that "An illness shall not be deemed to commence or continue unless the member is rendered incapable of work by some specific disease or by bodily or mental disablement." It is the duty and the province of the society to say what is the meaning of "specific disease," and no Court is entitled to interfere with them. The certificate sent in merely stated that the plaintiff was suffering from "debility," whereupon they requested that the specific form and nature of the debility should be stated on the certificate. It seems to me that it was for them to construe their rules. Whether "debility" is or is not a specific disease I am not going to say. It is a general term. It may legitimately be said that it is or that it is not a specific disease. But however that may be, I am clearly of opinion that it is for the society and not for the Court to consider what it means. The appeal must therefore be allowed.

Rowlatt J. I am of the same opinion. The case turns upon the application of s. 67, sub-s. 1, of the National Insurance Act, 1911. By that sub-section every dispute between a member and an approved society "relating to anything done or omitted by such person, society, or branch (as the case may be) under this Part of this Act or any regulation made thereunder, shall be decided in accordance with the rules of the society." If the dispute falls within those words that sub-section sets up the only tribunal which can entertain it. The phrase "a dispute . . . . relating to anything done or omitted . . . . under this Part of this Act or any regulation made thereunder" refers to a dispute in respect of something done or omitted in the administration of the Act or regulations. In *Heard* v. *Pickthorne* (1) the society had passed a resolution which fettered the consideration of evidence which under the Act and rules ought to be considered, and the whole complaint made there was that the society were not administering the Act or regulations at all, but were administering something arbitrary and of their own invention. As Vaughan Williams L.J. said (at p. 306) in that case, "When you come to a matter of this sort, which really interferes with the rights of those who are entitled to sickness benefits to come and prove what the condition of their health is, and what the cause of it is, by saying, 'You shall only prove, which really is a condition precedent to enable you to get these benefits, by calling a particular class of medical man and producing his certificate, that is to say, the certificate of a panel doctor,' I think that it is ultra vires, and I think that we have a right and a duty to prevent that sort of action by a friendly society." Hamilton L.J., after describing what the society did, said (p. 311): "That appears to me substantially and directly to take away from [the member] a portion of his right to benefits in respect of health insurance conferred by this part of the Act, within s. 1, sub-s. 1; and, if that is so, it 'transcends the class of irregularities, and calls for the intervention of the Courts.'" That seems to me to mean this: if you displace the Act and rules and do something which cannot be described as acting under the Act and rules but as obeying an overriding resolution you yourselves have passed and so put the case on a different basis, that is not a dispute as to something done or omitted under the Act and regulations at all. That is the principle of that decision, and the question is whether this case is brought within it. It may sometimes be difficult to draw the line. In *Heard* v. *Pickthorne* (1) Vaughan Williams L.J. admitted the difficulty of doing so, but the present case seems to me to fall well on the other side of the line. The certificate sent in by the plaintiff stated that she was suffering from "debility." It was rejected as insufficient. Mr. Comyns Carr says that the correspondence discloses that it was the regular custom of the branch to reject such a certificate as insufficient, and contends that that shews that they were acting under a general rule and by a practice by which they conceived themselves bound, and therefore he says the substance of the matter is that they are refusing sickness benefit in cases where what the member complains of cannot be further described than as "debility." To some extent he is justified in saying that, but, even so, I do not think that he brings his case over the line. If it appeared that the society, under the false guise of a decision that the evidence was insufficient, were really excluding a class of ailment which ought on a proper construction of the Act and rules to be included, I think that upon well-known principles their action could be challenged. But have the society in this case done anything of that kind? I think they have not. They are to decide whether a person is suffering from a specific disease or a bodily or mental disablement. They are to decide whether such and such information is sufficient to prove a specific disease or bodily or mental disablement. In this case it is perfectly plain that whether they decided rightly or wrongly they decided a matter within their jurisdiction. Jurisdiction depends not upon the decision but upon the subject-matter. The question whether a state of ill-health as described shews sickness coming within the Act and rules is the very thing left for them to decide. The case is entirely different from *Heard* v. *Pickthorne* (1) where the society assumed to rule out absolutely a whole class of evidence by reference to the personality of the people who gave it. For these reasons I agree that the appeal should be allowed.

---

(1) [1913] 3 K. B. 299.

---

(1) [1913] 3 K. B. 299.

Appeal allowed.

Solicitor for plaintiff: *W. C. Arnold, for Bennett & Ironside, Leicester.*

Solicitors for defendants: *Crowders, Vizard, Oldham & Co., for Owston, Dickinson, Simpson & Bigg, Leicester.*

(1) [1913] 3 K. B. 299.

J. S. H.

[IN THE COURT OF APPEAL.]

C. A.
1914
Jan. 21.

ALLEN *v.* THE GREAT EASTERN RAILWAY COMPANY AND OTHERS.

[1912 A. 241.]

Employer and Workman—Compensation—Company—Accident Fund—Scheme — Construction — Dependant — Workmen's Compensation Act, 1906 (6 *Edw.* 7, c. 58), *s.* 3—*Committee of Accident Fund—Decision final—Appeal to Court of Appeal—Jurisdiction.*

Under a scheme formed by the defendant company pursuant to s. 3 of the Workmen's Compensation Act, 1906, and managed by an accident committee, certain allowances were to be made "in case of the death of a member through an injury arising out of and in the course of his duties in the company's service." The scheme (inter alia) provided that "any question with regard to what is an injury within the meaning of that term as used in the scheme, as to who are dependants, as to which dependants are entitled to receive payments due from the fund, and the amount or amounts of such payments, shall be determined by the committee." And further, that "if any question (other than such as the committee, or the board of directors, are hereby expressly empowered to decide) shall arise with respect to the scheme . . . . or with respect to the construction or meaning of the scheme, or the rules framed in connection therewith, or any variation or alteration thereof respectively, such question shall be settled by the committee, whose decision shall be final and conclusive."

A workman in the employment of the company, who had become a party to the scheme, met with an accident in the goods depot of the company, and died from his injuries. His widow claimed compensation under the scheme as a dependant, but the committee declined to admit the claim without giving any reasons for their decision. In an action by the widow against the company and the accident committee claiming a declaration that the death of her husband was caused by an injury arising out of and in the course of his duties in the defendant company's service, and 195*l.* compensation:—

Held, that having regard to whole scheme, which was intended to be in substitution for the rights of workmen under the Workmen's Compensation Act, 1906, the committee had power to determine all claims arising under the scheme, and such determination was final.

Held, also, that the plaintiff, having failed to obtain an allowance of her claim by the committee, could not sustain the action.

Haworth v. *Andrew Knowles & Sons* (1903) 19 Times L. R. 658 distinguished.

APPEAL from a decision of Lord Coleridge J.

This was an action by Elizabeth Ann Allen, the widow and administratrix of George Albert Allen, deceased, and claiming as a dependant entitled to compensation in respect of her husband's death from a fall when in the employment of the defendant company as a porter. The deceased was employed at the wages of 23*s.* a week with a further 2*s.* a week on the average in respect of overtime. He was a member of the Great Eastern Railway Accident Fund, established under a scheme made in pursuance of s. 3 of the Workmen's Compensation Act, 1906, and certified by the Registrar of Friendly Societies on December 10, 1907.

By this scheme, which came into force on January 1, 1908, the Great Eastern Railway Accident Fund was to be managed by a committee consisting of five specified officers of the company and five servants of the company, being members of the fund. Any servant of the company was entitled to become a member of the fund, and the contributions payable to the fund and payments to be made by the company to members were set out.

The relevant portions of the scheme for the present purpose were as follows (p. 6 of the scheme and rules):—

"The allowances to be paid out of the fund shall be as follows:—

"(A) In case of the death of a member through an injury arising out of and in the course of his duties in the company's service, there shall be paid:—

"(1.) If the member leaves any dependants wholly dependent upon his earnings at the time of his death a sum equal to his earnings in the employment of the company as aforesaid during the three years next preceding the injury, or the sum of 150*l.*, whichever of these sums is the larger, but not exceeding in any case 300*l.* . . . ."

"(2.) If the member does not leave any such dependants but leaves any dependants in part dependent upon his earnings at the time of his death, such sum not exceeding in any case the amount payable under the foregoing provisions as may be agreed upon, or, in default of agreement, as may be determined by the committee to be reasonable and proportionate to the injury to the said dependants."

"(C) In case of partial incapacity through an injury arising out of and in the course of a member's duties in the company's service, there shall be paid to the member so long as such partial incapacity shall continue, commencing from the date of such partial incapacity, such a weekly sum not exceeding 50 per cent. of the weekly earnings of the member (not exceeding 1*l.*) as the committee in their absolute discretion may determine . . . ."

It was further provided by the scheme (p. 9):—

"If, in the opinion of the committee, an injury sustained by a member is attributable to serious and wilful misconduct on his part, any compensation claimed in respect of that injury shall, unless the injury result in death or serious and permanent incapacity, be disallowed." The two last clauses of the scheme on pp. 10 and 11 provided that:—

"Any question with regard to what is an injury within the meaning of that term as used in the scheme, as to who are dependants, as to which dependants are entitled to receive payments due from the fund, and the amount or amounts of such payments, shall be determined by the committee.

"If any question (other than such as the committee, or the board of directors of the company, are hereby expressly empowered to decide) shall arise with respect to the scheme, or the right to alter the amount or duration of an allowance thereunder, or with respect to the construction or meaning of the scheme, or the rules framed in connection therewith, or any variation or alteration thereof respectively, such question shall be settled by the committee, whose decision shall be final and conclusive."

The deceased agreed in writing with the defendants to accept the scheme and the compensation thereby provided in substitution for his rights under the Act.

On August 12, 1911, the deceased in returning to the goods depot of the defendants after the interval for dinner fell from a raised platform, or down the steps leading to the platform, and sustained injuries from which he died on August 15, 1911. The plaintiff alleged that the deceased died through an injury arising out of and in the course of his said duties in the defendant company's service. She gave notice to the company and the accident committee, and made a demand in writing for compensation, claiming 179*l.* 8*s.*, being three years' wages at 23*s.* per week. On November 16, 1911, the accident fund committee declined to admit Mrs. Allen's claim respecting the death of her husband, and communicated this decision to her by a letter of November 17, 1911. No reasons were given for the decision.

The plaintiff then brought her action against the company and the accident fund committee, and claimed (1.) a declaration that the death of George Albert Allen was caused by an injury arising out of and in the course of his duties in the defendant company's service; (2.) a declaration that under the said scheme the defendant company and/or the defendant committee were liable to pay compensation to the plaintiff; (3.) payment of 195*l.* (being the 179*l.* 8*s.* previously claimed together with 15*l.* 12*s.* in respect of 2*s.* a week overtime).

The main defence was that the decision of the committee under the scheme was final and conclusive. Paragraph 14 of the defence set out the two last clauses of the scheme set out above. Paragraph 15, which was admitted, stated the refusal of the committee to entertain the claim. It was further pleaded, alternatively, that it was a condition precedent to any liability on the defendants' part to pay any claim by a personal representative or dependant of a deceased member that such person should have first obtained an allowance of such claim by the defendant committee, and that no such allowance had been obtained, and the committee had come to a final and conclusive decision against the claim.

The case came before Lord Coleridge J. and a special jury, and after counsel for the plaintiff had opened his case, the learned judge dealt with the point of law raised on the pleadings and held that the plaintiff had no case and must go to the committee.

The plaintiff then brought this appeal to the Court of Appeal.

Spencer Bower, K.C., and *Stuart Bevan*, for the appellant. The question is whether the applicant is a proper claimant under the scheme, and that is a question for the Court. In order to oust the jurisdiction of the Court there must be plain language in the contract between the parties shewing that that was the intention. Here the scheme provides for the determination by the committee of what is an "injury," but the question whether the injury arose out of and in the course of the employment is not in terms left to the committee to determine finally. That is the whole point. It would have been easy to have inserted words in the scheme to effect that purpose, but such words are not there. There is a difference in the questions and matters which the committee have to "determine" and those in respect of which their decision is to be "final and conclusive." The two groups of questions are contrasted. The appellant submits that there is an appeal from the decision of the committee, for which indeed no grounds were stated. It may well be that they did not determine the question before them on grounds within their jurisdiction. In the case of an ordinary contract there is a right to resort to the Courts to construe it, unless, as in *Scott* v. *Avery* (1), there is something first to be done before the Court can be appealed to. There was no condition precedent here to be fulfilled before an action can be brought. *Haworth* v. *Andrew Knowles & Sons* (2) is a somewhat similar case and is in favour of the appellant.

Montague Shearman, K.C., and *J. B. Matthews, K.C.*, for the respondents, were not called upon.

Lord Reading C.J. This is an appeal by the plaintiff from a decision of Lord Coleridge J., who, after the opening of the plaintiff's case by Mr. Spencer Bower, dealt, by consent of the parties, with the point of law raised upon the pleadings and indicated by Mr. Spencer Bower in his address to the jury.

It is admitted here that there is no objection to be taken to the learned judge having dealt with the case in that way instead of waiting till evidence had been given and then giving a judgment at the end of the plaintiff's case. This was a substantial point raised by the defence, and if this defence was well founded then it was useless to proceed further with the trial.

The plaintiff based her claim upon a right to recover compensation for the fatal injury sustained by her husband, in pursuance of a scheme certified by the Registrar of Friendly Societies under s. 3 of the Workmen's Compensation Act, 1906. It is not in controversy that under the statute there is power

---

(1) (1855) 5 H. L. C. 811.

(2) 19 Times L. R. 658.

C. A.
1914

ALLEN
v.
GREAT
EASTERN
RAILWAY.

Lord Reading
C.J.

under s. 3 to frame a scheme which, if satisfactory to and certified by the Registrar of Friendly Societies, takes the place of the obligation placed upon the employer, and the rights given to the workmen under the Workmen's Compensation Act, 1906. In other language, it enables the employer and the workmen to contract out of this statute. We have therefore to deal with a scheme which takes the place of the rights given by the statute.

The plaintiff's statement of claim alleges the facts as to the deceased having been in the employment of the defendant company, that he was a porter on the defendant company's railway and goods depot; it states the rate of wages which he received, and further that he was a party to this scheme, and that the scheme was operative and of full effect at the time of the death of this unfortunate man. Therefore his rights, and the rights of his widow through him, must depend upon the terms of the contract. The allegation as to the claim for compensation is contained in paragraph 7 of the claim and is that upon the deceased's death the plaintiff duly gave notice to the defendant company and the defendant committee, and made a demand in writing for compensation. Then come these words: "But the defendants, in breach of the said agreement, have refused and still refuse to make the payment provided by the terms thereof, and to which the plaintiff claims to be entitled." The claim of the plaintiff is made up as follows: wages at 23*s*. a week for a certain number of weeks, and then a further 2*s*. a week as overtime, making a total claim of 195*l*. The prayer is (1.) for a declaration that the death of the said Allen was caused by an injury arising out of and in the course of his duties in the defendant company's service; (2.) a declaration that under the scheme the defendant company and/or the committee are liable to pay compensation to the plaintiff in respect of the death of Allen; and (3.) payment of 195*l*. The answer to each of those claims must depend on the meaning which should be given to the two paragraphs of the scheme which are quoted in paragraph 14 of the statement of defence. In my opinion, in order to construe those words one must look at the whole scheme. One must consider what is intended by the parties to the scheme, and when I examine it I find abundant evidence that the intention was to substitute a complete scheme for the rights and obligations under the Workmen's Compensation Act. When I say a complete scheme I mean a scheme which would not only give certain rights and certain powers to the committee, but would also provide for disputes. As was said in the case of *Haworth* v. *Andrew Knowles & Sons* (1), to which our attention was called, one of the objects of this legislation was to enable parties to ascertain their rights without the expense and trouble of litigation.

The first and most important question which we are asked to determine here is whether or not the death of Allen was caused by an injury arising out of and in the course of his employment. It is plain that there is machinery provided in this scheme for the purpose of determining that question. In fact, it is not suggested that there is no such machinery. The words in the two last paragraphs in the scheme shew plainly that this is just one of the questions left to the decision of the committee. If reference is made to p. 6, paragraph (A) of the scheme, it will be seen that the allowance to be made out of the fund shall be "in case of the death of a member through an injury arising out of and in the course of his duties in the company's service." Now turning to p. 10: "Any question with regard to what is an injury within the meaning of that term as used in the scheme,"—that is an injury arising out of and in the course of his duties in the company's service—"as to who are dependants, as to which dependants are entitled to receive payments due from the fund, and the amount or amounts of such payments, shall be determined by the committee." Thus the tribunal is fixed by agreement. But it is said that the provision that any such question shall be determined by the committee is not the same in effect as a provision that it shall be decided by the committee, and that the decision of the committee shall be final and conclusive. That is the main argument to which our attention has been directed. It is contended that, before we can come to the conclusion that the jurisdiction of the Court is ousted, there must be language which satisfies us that such is the intention of the parties. If we once come to the conclusion that the true meaning of the words used is that an end should be made of any disputes in reference to this question, it is clear that the plaintiff has no cause of action. I have come to the conclusion, after listening to the very ingenious arguments of both Mr. Spencer Bower and Mr. Stuart Bevan, that the true meaning is that this committee not only had the power conferred upon it by the scheme to decide the question, but that it was intended that the committee's decision should be a determination and that it should be final. Moreover, assuming that Mr. Spencer Bower could establish that these words do not mean that the decision should be "final," it would be incumbent on him to shew that there was some right of appeal conferred from the decision of the committee, and he was quite unable to point to any such right given under the scheme. His argument is that this decision of the committee is a decision which must be read in order to defeat his claim as being final and conclusive, and ousting the jurisdiction of the Court. If his contention is right it would follow that the committee might decide the matter, and that it would still be open to a person to bring an action in the Courts and get a decision conflicting with the decision of the committee. That would in effect result in the Court sitting as an Appeal Court from the decision of the committee. No doubt, it would be quite possible to come to such a conclusion upon appropriate words, but, in my view, having regard to the words used it was not contemplated that there should be any litigation in the Courts with regard to this question as to whether an injury arose out of and in the course of the employment in the company's service.

---

(1) 19 Times L. R. 658.

Having come to that conclusion, it seems to me that the plaintiff's action must fail, and that it is not necessary to go further and deal with the paragraph which has also been discussed at the end of which the words occur "whose decision shall be final and conclusive." It is quite true there is a difference of phraseology, and much has been made of that by counsel for the plaintiff. But the opinion that I have formed is, considering the last paragraph and observing that it begins "If any question shall arise," and these words follow in brackets, "(other than such as the committee, or the board of directors of the company, are hereby expressly empowered to decide) "—" which arise with respect to the scheme" &c.—then the decision shall be final and conclusive. That means that power has already been given in the immediately preceding paragraph to decide the question as to what is an injury within the meaning of the scheme, and if there are other matters in respect of which there has been no express power given, then the wide powers are conferred with the final words in the paragraph "whose decision shall be final and conclusive." I do not think it is necessary to rely on that last paragraph at all. I base my decision on the preceding paragraph to which I have called attention. In my view the plaintiff cannot sustain a claim in the Courts until there has been a determination, that is a decision which is a final decision by the committee, that the injury has arisen out of and in the course of the workman's employment. The appellant having failed to obtain that decision—it being clear on the admissions made that the committee have rejected the claim—the appeal must be dismissed.

Buckley L.J. In this case the necessary conditions have been satisfied to enable the registrar to certify, and he has certified, under s. 3 of the Workmen's Compensation Act, 1906, in respect of the scheme which is before us, and the deceased had entered into a contract in writing with the defendant company and with the committee, by which he agreed to accept the scheme. The result of that was that in the words of the Act of Parliament the provisions of the scheme were substituted for the provisions of the Act, and the employer is liable only in accordance with the scheme. So that all I have to see is what is the result of this scheme. The argument which has been presented to us has been rested mainly upon this fact, that there are not contained in the scheme any words to the effect that adjudication upon claims made under the scheme shall rest with the committee, whether going or not going on to say "whose decision shall be final and conclusive." I look in the first instance to see whether, although those words are not expressly there, yet by plain implication and proper construction of the scheme as a whole that is its effect. To my mind, the

Buckley L.J.

indications are numerous and plain to the effect that it is intended to provide by this scheme that not only questions of construction, or questions as to particular matters mentioned in the last complete paragraph on p. 10, shall be determined by the committee, but that claims, and the right to receive payment of claims, shall be determined by the committee. I will point to two or three of those matters. At p. 6 I find a provision as to what is to happen in the event of a man dying; the second alternative is that of the man dying and not leaving dependants. In that case it is provided that the sum paid him shall be such sum "not exceeding in any case the amount payable under the foregoing provisions as may be agreed upon, or, in default of agreement, as may be determined by the committee to be reasonable and proportionate to the injury to the said dependants." So there I find plainly that in that event the committee is to determine. If I take the prior event, that of the member leaving dependants, I find, on examining the scheme, that the same result ensues. It is true that sub-paragraph 1 on p. 6 points in the first place to an arithmetical calculation, and there is nothing there about the committee determining, but after making that arithmetical calculation I have to apply a proviso, and the proviso says, amongst other things, that the amount of any payment made to the member under clause C in respect of such injury shall be deducted from such sum. Clause C is this: that if a man after such injuries shall for the time being be partially incapacitated, then so long as he is partially incapacitated he shall be entitled to a sum within certain limits such as the committee in their absolute discretion may determine. So that an essential feature for the purpose of sub-paragraph 1 on p. 6 is a sum whose determination rests in the absolute discretion of the committee thereon.

It seems to me to follow that the determination of the major sum from which the minor sum which is in their absolute discretion has to be deducted is also in the dominion of the committee.

Turning now to p. 9 I find this: supposing a weekly payment has been fixed, it would be according to my view fixed by the committee thereon.

Mr. Spencer Bower would say No, it is fixed by somebody else. Suppose he is right and it is fixed by somebody else. Then on p. 9 that weekly payment under the scheme may be reviewed by the committee, so that the committee according to his view is to review a sum which has been determined by a different authority. That seems to me improbable.

Again, it is more plain by the last complete paragraph on p. 9, because supposing Mr. Spencer Bower is right, and that an authority other than the committee determines a sum, then, if in the opinion of the committee the injury sustained by a member is attributable to serious and wilful misconduct, they may disallow it, so that when this supposed external authority has determined that he is entitled to something, the committee may say "we think there was serious and wilful misconduct and we disallow it." Those are indications which make it, to me, perfectly plain that the intention and effect of this scheme is that it is for the committee to adjudicate upon claims.

Then we were pressed with the decision of this Court in the case of *Haworth* v. *Andrew Knowles & Sons.* (1) I do not feel any difficulty with regard to that case. The point of that case was, that in an event, namely, amongst other things, if a workman failed to go to work when able to do so, the committee had power to stop the further payment of his allowance. What the Court held was this: here is an event in which the committee have a power, but there are no words which provide that it shall reside within the dominion of the committee to determine whether the event has happened or not. If it has happened they have a power, but if it has not happened they have not a power. Whether the event has happened or not is a matter not for the decision of the committee, but for the decision of a Court of law. It is true that in the course of his judgment Lord Collins used the words "finally determine," and the present Master of the Rolls used the words "sole tribunal to decide." I do not feel any difficulty with regard to those words. Those words seem to me to mean that if the committee were going to say "we shall stop your further payment" they would have, of course, to form an opinion that he had

(1) 19 Times L. R. 658.

failed (if that was the view on which they were proceeding) to go to work, and they would have to decide in that sense. They would have to form an opinion upon it in order to raise their power to do the further act of stopping the further payment of his allowance, and what was meant by those words "finally determine" or "sole judge" is merely that, although they might form an opinion upon it and then say "we shall stop your allowance," it was not for them to determine that at all, it was not for them to decide it, it was for somebody else to decide it.

The whole point of *Haworth* v. *Andrew Knowles & Sons* (1) was that the power of the committee there was only to arise in an event, and the determination of the fact of whether that event had happened or not is a matter to be investigated by a proper tribunal, that is to say, by a Court of justice before whom that point might be brought for decision. It seems to me here that upon these rules there is in the scheme a complete indication, on the true construction of the scheme, that it is for the committee to adjudicate. If that is so, then having regard to the words of the Act of Parliament, the liability of the employer being only in accordance with the scheme, the only liability of the employer is to pay such sum as, under the scheme, the committee shall find to be payable. On these grounds, I think the Court has no jurisdiction and that the action fails, and this appeal must be dismissed.

PHILLIMORE L.J. I am of the same opinion. This case has been principally argued as if it turned upon the construction of the last two paragraphs on p. 10 of the scheme. It has been said, speaking of the last but one, that it cannot conclude this case because it does not refer to a judicial determination, but to a kind of sub-legislation, because at any rate if there is any power to determine it is a non-conclusive power to determine, and lastly, and this was the only point that troubled me at all, that it does not appear by the letter of the defendant company which is concisely stated in paragraph 15 of the defence that the committee refused payment on any such ground of determination. Now, I will deal with those three points. The first I do not propose to deal with at length. The pages of the scheme are strewn with paragraphs which would have no meaning if this referred to sub-legislation, and I doubt very much whether if it did it would not be ultra vires, and it is not intended, in my opinion, to be anything of the kind. With regard to the second it turns upon particular words. The phrase in this paragraph is "determine," and the phrase in the next paragraph is "decide," and the decision shall be final and conclusive. I will not venture to say whether according to etymology "determine" means marked out by terms or bounds, or means to bring to a term or conclusion, but I do think that, as a matter of precise and legal English, whenever the word "determine" is used it is at any rate not contemplated that it will be other than a final determination. It is possible the words in the second paragraph are stronger than the words in the first. It does not make the other words weak. They are quite strong enough by themselves; and the last answer to this observation is this, that at any rate it is to be determined by the committee. If not finally determined, where is the Court of Appeal? It does not mean determined by the committee in such a sense that the determination can be passed by as an idle whim if the party chooses to bring an action. It means determined until something has been done to undetermine it by somebody who has jurisdiction to review it, not by somebody who would pass it by and before whom it really ought not to be laid at all because it would not be relevant to the issue he had to try. That is my next answer, and my third answer to it is this: if the committee's determination is not final, the plaintiff has not got a determination, and, as I shall shew in a moment, unless she has got a determination she cannot sue. Now, to deal with the third objection which gave me the most trouble, namely, that it does not appear on the face of the judgment of the committee that they determined this matter upon some ground within their jurisdiction, such as that this was not an injury within the meaning of the scheme. The judgment is not, as a French Court would say, *motivé*. It may be open to a construction that the committee decided upon some other ground, and I think there would be something in this if the burden lay on the defendants to answer a good claim of the plaintiff. In my opinion, the real ground for deciding this case is that the plaintiff has not made out a prima facie claim. She is not suing under the Employers' Liability Act, or under Lord Campbell's Act, she is suing in contract under this scheme which is a substitution for the provisions of the Workmen's Compensation Act, and, as was frankly admitted, she can only recover if she brings herself within the scheme. Now, taking the words of counsel for the appellant, what is the contract that it is suggested the committee has made with her husband? It is that in case of the death of a member through an injury arising out of and in the course of his duties in the company's service there shall be paid so much. The conditions precedent are that he should be a member, and that he should die through an injury arising out of and in the course of his employment in the company's service. Who is to determine, at any rate in the first instance, whether he has died from an injury, and whether it is an injury within the meaning of that term as used in the scheme? Clearly the committee. If it has not determined in the plaintiff's favour, the plaintiff has no cause of action. Therefore I agree that this appeal should be dismissed.

---

(1) 19 Times L. R. 658.

Appeal dismissed.

Solicitors: *Charles T. Wilkinson; Edward Moore.*

G. M.

[IN THE COURT OF APPEAL.]

C. A.
1914
Jan. 14, 19, 28, 30.

BONNEY *v.* JOSHUA HOYLE & SONS, LIMITED,

Employer and Workman—Compensation—Recording Memorandum of Agreement—Notice to "parties interested"—Notice sent to Approved Society—Appearance before County Court Judge—Objection to Locus Standi—Order of County Court Judge—Rules of Court—Ultra vires—Appeal—Court of Appeal or Divisional Court—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. II., pars.* 4, 9, 12—*National Insurance Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 55), *s.* 11—*Consolidated Workmen's Compensation Rules, July,* 1913, *r.* 44 (3.).

By paragraph 4 of Sched. II. to the Workmen's Compensation Act, 1906, "The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but a committee or an arbitrator may, if they or he think fit, submit any question of law for the decision of the judge of the county court, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, or where he gives any decision or makes any order under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by Rules of the Supreme Court either party appeals to the Court of Appeal; and the judge of the county court, or the arbitrator appointed by him, shall, for the purpose of proceedings under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the proceedings were an action in the county court."

By paragraph 9 of the same schedule, "Where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of Court, by the committee or arbitrator, or by any party interested, to the registrar of the county court who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a county court judgment.

"Provided that—

"(*a*) no such memorandum shall be recorded before seven days after the despatch by the registrar of notice to the parties interested; . . . .

"(*d*) where it appears to the Registrar of the county court, on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum, or an agreement as to the amount of compensation payable to a person under any legal disability, or to dependants, ought not to be registered by reason of the inadequacy of the sum or amount, or by reason of the agreement having been obtained by fraud or undue influence or other improper means,

C. A.
1914

BONNEY
v.
JOSHUA
HOYLE
& SONS,
LIMITED.

he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the judge, who shall, in accordance with rules of Court, make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just; . . . . "

By r. 44 (3.) of the Consolidated Workmen's Compensation Rules, July, 1913, "Where an agreement is made as to the amount of compensation payable in the form of a weekly payment or of a lump sum to a workman who is an insured person within the meaning of the National Insurance Act, 1911, or as to the redemption by a lump sum of a weekly payment to a workman who is such an insured person, the Insurance Commissioners, or the society or committee concerned in the administration of any benefit to which such insured person is entitled under the last mentioned Act, shall for the purposes of paragraph 9 of the Second Schedule to the Act, and of these rules, be deemed to be parties interested."

Held, that an order made by a county court judge on an application to record a memorandum of agreement, which has been refused by the registrar and referred by him to the judge under paragraph 9 (*d*) of Sched. II., is an order made by him as arbitrator, from which an appeal lies to the Court of Appeal under paragraph 4.

Held, also, that an approved society is not a "party interested" within the meaning of paragraph 9 of Sched. II., and that r. 44 (3.) so far as it purports to declare that it is to be so deemed is ultra vires.

APPEAL from a decision of the judge of the Bury County Court in a claim under the Workmen's Compensation Act, 1906.

Frederick Bonney, the workman, met with an accident on November 9, 1912, while in the employment of Joshua Hoyle & Sons, Limited. At the time of the accident he was an "insured person" within the meaning of the National Insurance Act, 1911, being a member of an "approved society," the Scottish Legal Health Assurance Society. Compensation at an agreed rate of 9*s*. 6*d*. per week (the workman's wages being 19*s*.) was paid to the workman until February, 1913. He then recommenced work, and one half the difference in his earnings week by week was paid until April 13. On May 23, 1913, an agreement was arrived at between the workman and his employers for the redemption of any weekly payments that might become due and in satisfaction of all possible future liability by the payment to the workman of a lump sum of 10*l*. and costs. This agreement was embodied in a written memorandum dated June 7, 1913, and signed by the workman and the employers, and was duly filed by the workman's solicitors with the registrar of the Bury County Court in accordance with paragraph 9 of Sched. II. to the Workmen's Compensation Act, 1906, and a separate statement (Form 37) as directed by rr. 51 (1.) and 43 (3.) of the Consolidated Workmen's Compensation Rules, 1913, was also sent to the registrar with the memorandum. In this statement it was stated, in accordance with the requirements of r. 51 (1.), that the applicant was an insured person and that the name of the society concerned in the administration of the benefit to which he was entitled was the Scottish Legal Health Assurance Society. The registrar sent out a notice to the society in accordance with the provisions of r. 45 of the Consolidated Rules of 1913 and the form thereby provided, the society being treated by him as "parties interested" in pursuance of the provisions of r. 44 (3.) of the Consolidated Rules of 1913.

On receipt of the notice the society sent to the registrar notice of objection to the registration of the memorandum of agreement on the ground that the amount of compensation offered was in their opinion insufficient and if recorded was likely to have an injurious effect on the society. In consequence of this notice the registrar refused to record the memorandum of agreement. On June 15, 1913, the registrar sent a notice to the workman and to the employers stating that he had refused to record the memorandum and had referred the matter to the judge and fixing July 15, 1913, for the hearing.

The matter came on for hearing before the county court judge on July 15, 1913. At the hearing the workman, the employers, and the society were represented by their respective solicitors. The preliminary point was at once taken by the solicitor for the employers that the society had no right to be heard, and that the notice given by them objecting to the recording of the memorandum ought not to be read as the society had no locus standi in the proceedings. His ground for this contention was that they were not "parties interested" within the meaning of paragraph 9 of Sched. II. to the Workmen's Compensation Act, 1906, and that r. 44 (3.) of the Consolidated Workmen's Compensation Rules, July, 1913, which purported to make them "parties interested" was ultra vires. The point raised was argued at considerable length and the judge reserved his decision in the matter until September 15, 1913. On that date the judge gave his decision disallowing the objection raised by the employers' solicitor and finding in favour of the society that they had a right to appear and be heard and allowing costs to the society on "C" scale. The employers' solicitor then asked the judge not to go into the question of adequacy, but to adjourn this point sine die in order that he could appeal against the decision on the preliminary point, and to this the judge agreed.

The present appeal was from that decision.

Sankey, K.C., and *Adshead Elliott*, for the appellants.

J. B. Matthews, K.C., and *Comyns Carr*, for the assurance society. There is this preliminary objection—that the appeal on this question lies to the Divisional Court and not to the Court of Appeal. Under Sched. II., paragraph 4, of the Workmen's Compensation Act, 1906, appeals from the county court judge sitting as arbitrator under the Act lie to the Court of Appeal; but appeals from his decisions when he is acting as county court judge and not as arbitrator lie to the Divisional Court: *Panagótis* v. *Owners of S.S. Pontiac.* (1) There was no arbitration in this instance. It is a case where a statutory jurisdiction is given to the registrar, who can refer the matter to the county court judge, from whom an appeal lies, it is submitted, to the Divisional Court and not to this Court.

The jurisdiction under paragraph 9 (*d*) of Sched. II. of the Workmen's Compensation Act, 1906, belongs to the county court judge only even though there are arbitrators in existence under paragraphs 1 and 2. There was no dispute between the parties, but the registrar was allowed by paragraph 9 (*d*) to act on any information he liked, and he referred the matter to the judge. Then the judge was exercising a jurisdiction apart from the arbitration, and an appeal from his order lies to the Divisional Court, not to this Court: *Panagotis* v. *Owners of S.S. Pontiac* (1); *Johnston v. Mew, Langton & Co.* (2) Paragraph 12 of Sched. II. shews that in some cases under Sched. II. the county court judge is acting as judge and not as arbitrator.

---

(1) [1912] 1 K. B. 74.

(2) (1907) 98 L. T. 517.

[COZENS-HARDY M.R. referred to *Moss* v. *Great Eastern Railway.* (1)]

That was a case under s. 1, sub-s. 3, of the Act of 1906 and does not apply here. It is submitted that the words "or where he gives any decision or makes any order under this Act" which have been inserted in paragraph 4 of Sched. II. do not give a right of appeal to this Court in every case.

Sankey, K.C., and *Adshead Elliott*, for the employers. The appeal is rightly brought to this Court. The only foundation of the preliminary objection is the decision in *Panagotis* v. *Owners of S.S. Pontiac.* (2) There was no question in that case about recording a memorandum, nor under any of the rules contained in Sched. II. It was an order for the detention of a ship made under s. 11 of the Act itself and did not necessarily refer to arbitration proceedings. Under that section the judge is acting as judge, not as arbitrator; and any judge may act; not necessarily the judge of the district where the parties reside. In the present case the question arises under Sched. II., which "is simply a code of rules regulating arbitrations under the Act." (3) The schedule is headed "Arbitration, &c." Appeals are provided for by Sched. II., paragraph 4, which is an amendment and extension of Sched. II., paragraph 4, of the Act of 1897 and contains the additional words "or where he gives any decision or makes any order under this Act." Here the judge has "made an order" and has done so as arbitrator, not as judge. His only jurisdiction was under paragraph 4, sub-paragraph (*d*), of Sched. II., the whole of which refers to arbitrations, and this order was made in an arbitration. The point is covered by *Moss* v. *Great Eastern Railway.* (1) This Court has entertained appeals in many cases arising out of the recording of agreements, e.g., *Phillips* v. *Vickers, Sons & Maxim* (4); *Rhodes* v. *Soothill Wood Colliery Co.* (5); *Mullholland* v. *Whitehaven Colliery Co.* (6); *Mortimer* v. *Secretan* (7); *Harding* v. *Royal Mail Steam Packet Co.* (8); *Devitt* v. *Owners of S.S.*

---

(1) [1909] 2 K. B. 274.
(2) [1912] 1 K. B. 74.
(3) [1912] 1 K. B. 79.
(4) [1912] 1 K. B. 16.
(5) [1909] 1 K. B. 191.
(6) [1910] 2 K. B. 278.
(7) [1909] 2 K. B. 77.
(8) (1910) 4 B. W. C. C. 59.

Bainbridge (1); *Popple* v. *Frodingham Iron and Steel Co.* (2); *Rex* v. *Templer.* (3) *Johnston* v. *Mew, Langton & Co.* (4) was a decision under the old Act. In *Howarth* v. *Sir B. Samuelson & Co.* (5) the judge refused to hear the case. Sched. II., paragraph 4, does not say that for an appeal to lie to this Court the judge must have been sitting as arbitrator. A decision in favour of this objection will cause great practical inconvenience. [They also referred to the Workmen's Compensation Rules, 1913, rr. 50 (*e*), 51 (10.), and 58 (1.), and Appendix B, Form 36.]

Barrington-Ward and *Harold R. Barker*, for the workman.

J. B. Matthews, K.C., in reply, referred to Sched. II., paragraph 16.

Cur. adv. vult.

Jan. 28. COZENS-HARDY M.R. I have had an opportunity of reading the judgments which are about to be delivered by the other members of the Court and I agree with them.

SIR SAMUEL EVANS, PRESIDENT. In this case a memorandum of agreement between the employers and an injured workman as to the compensation to be paid to the workman under the Act was sent to the registrar of the county court to be recorded under paragraph 9 of Sched. II. of the Act. The registrar refused to record the memorandum, and referred the matter to the judge of the county court. The matter so referred to the judge came before him, and was dealt with by him under paragraph 9 aforesaid. Upon the hearing he gave a decision, and made a certain order. The decision and order were made in favour of a society which claimed to be heard under s. 11 of the National Insurance Act, 1911. The employers have appealed against such decision and order to this Court.

Upon this appeal coming on for hearing a preliminary objection was taken that no appeal lies to this Court from any decision or order of the county court judge made under paragraph 9 (*d*) of the Second Schedule, but that the appeal should have been to the Divisional Court of the High Court of Justice. The contention was that under that paragraph the county court judge acted in his judicial capacity as judge, and that he did not act as arbitrator under the Act, and that upon that ground no appeal lay to this Court. The case of *Panagotis* v. *Owners of S.S. Pontiac* (1) was mainly relied upon in support of the contention. The decision in that case is binding upon this Court, and in my humble judgment the decision was right. As was pointed out in that case, the order was made under s. 11 of the Workmen's Compensation Act, 1906, which "authorizes an order to be made at any time, whether before or after an application for arbitration, and by a judge of any Court of record in England or Ireland, words which plainly include any judge of the High Court." (2) The case had nothing to do with the Second Schedule. It does not govern or affect the question which now comes before the Court.

---

(1) [1909] 2 K. B. 802.

(2) [1912] 2 K. B. 141.

(3) [1912] 2 K. B. 444.

(4) 98 L. T. 517.

(5) (1911) 104 L. T. 907.

It was said in that case that Sched. II. was simply a code of rules regulating arbitrations under the Act, and its effect was the same as though s. 1, sub-s. 3, of the Act had terminated in the words "in accordance with the following rules," and Sched. II. had been set out in full immediately after and as part of that sub-section.

Sect. 1, sub-s. 3, of the Act is the only section which refers to Sched. II.

I agree respectfully that the schedule is to be read as if it were part of, or appended to, s. 1, sub-s. 3. But to call it "simply a code of rules regulating arbitrations" (3) is too restricted a description if a limited and strict meaning is attached to "arbitrations." It is a schedule dealing with "arbitrations and proceedings connected therewith"; and it is to be observed that the schedule is headed "Arbitration, &c."

The question in this case turns upon the effect and extent of the provisions of paragraph 4 of the schedule.

Sched. II., paragraph 4, of the Act of 1906 was extended beyond the corresponding clause of the Act of 1897; the words "or where he gives any decision or makes any order under this Act" were added.

---

(1) [1912] 1 K. B. 74.

(2) [1912] 1 K. B. 76.

(3) [1912] 1 K. B. 79.

Under the paragraph as it now stands, where the county court judge "gives any decision or makes any order under this Act," the decision shall be final unless, within the time and in accordance with the conditions prescribed by Rules of the Supreme Court, either party appeals to the Court of Appeal.

I think it cannot reasonably be doubted that if the Second Schedule were appended to and read in conjunction with s. 1, sub-s. 3, of the Act, the proceedings taken in this case under and in accordance with paragraph 9 of the schedule are proceedings as to the liability to pay compensation under the Act, or as to the amount or duration of compensation, or proceedings connected therewith, and that the appeal from the decision and order of the judge under paragraph 9 is to the Court of Appeal.

The contrary construction that the appeal should be first to the Divisional Court, and afterwards to this Court, would cause much trouble, delay, and expense to suitors, and would be contrary to the general policy of the Act relating to appeals. Such a construction is not required by the words. On the other hand paragraph 4, and particularly the words added to it when the 1906 Act was passed, reasonably and properly construed are consistent with the policy of the Act in avoiding multiplication of appeals, and in my opinion enact that the appeal from a decision or order of a county court judge under paragraph 9 (*d*) should be direct to this Court. Therefore the preliminary objection fails.

EVE J. I agree in thinking that we ought to overrule the preliminary objection which has been taken to our hearing this appeal. The subject-matter of the appeal is an order made by the county court judge upon a matter referred to him by the registrar under sub-paragraph (*d*) of paragraph 9 of the Second Schedule to the Act of 1906. Is a decision or order given or made on such a reference a decision or order under the Act for the purposes of paragraph 4 of the Second Schedule, in which case the appeal therefrom lies to this Court, or is it a decision or derer given or made by the judge in the exercise of his general jurisdiction as a county court judge, from which the appeal is to the Divisional Court?

Prima facie it would clearly seem to be the former. It is a decision under a procedure created for the purposes of the Act with the object of making an agreement to pay a lump sum in redeeming a weekly payment under the Act enforceable as a county court judgment.

In construing sub-paragraph (*d*) it is not legitimate to divorce it from the context. Paragraph 9, to which this sub-paragraph is in the nature of a proviso, deals not only with cases in which the amount of compensation under the Act has been ascertained by agreement, but also with cases in which it has been ascertained by a committee or by an arbitrator, and it enacts that where the compensation has been ascertained by any one of these methods a memorandum thereof is to be registered, subject, however, to five provisoes, one of which is to be found in sub-paragraph (*d*). As a matter of construction it is, in my opinion, impossible to differentiate for the purposes of an appeal between orders made under any one of these provisoes, and if the objection to this Court entertaining an appeal against an order made under sub-paragraph (*d*) be sound, then I think it follows that appeals to this Court from orders under sub-paragraphs (*b*), (*c*), and (*e*) must equally be rejected.

Paragraph 9 commences with the phrase, " Where the amount of compensation under this Act " and so on, and the object of the paragraph is to give the person to whom compensation—ascertained by any of the methods therein mentioned—is payable, or in whose favour a decision has been given, power to enforce his right to payment or otherwise as a judgment: in short, it is the culminating step by which the fruits of the contest are secured to the successful participant in the contest; and to hold that decisions given and orders made under such a paragraph are not decisions and orders under the Act would, in my opinion, be inconsistent with the wording, scope, and spirit of the paragraph. I think all decisions and orders under this paragraph are essentially " decisions and orders under the Act " from which the appeal lies to this Court only, under paragraph 4 of the same Second Schedule.

In so holding I need hardly say I do not consider I am doing anything inconsistent with the judgment of this Court in the case of *Panagotis* v. *Owners of S.S. Pontiac* (1), which is, of course, binding upon us.

All that was thereby decided was that in a case where a county court judge makes an order under the statutory power conferred upon him by s. 11 of the Act, his order is not an order under this Act within paragraph 4 of the Second Schedule. It does not follow from this that an order made under paragraph 9 is not an order within paragraph 4; but there are more material distinctions between the two orders than the mere fact that the one is made under a section in the Act and the other under a paragraph in the schedule. For example, the application under s. 11 may be made to any county court judge, however remote his district may be from that in which the parties concerned in the question of compensation under the Act reside or in which the accident giving rise to the question occurred. The application under paragraph 9 must be to the judge of the county court of the district in which all the parties concerned reside or in which the accident occurred or in which (in other cases) the workman was last employed, or—if the accident occurred at sea—in which the ship shall be when the matter is to be done, or in which her port of registry is, or in which the workman or his dependants resides or reside. (See paragraph 11 of Sched. II. and the rules thereunder.)

Again, an order may be made under s. 11 on a mere allegation that the shipowners are liable, and before any proceeding to recover compensation has been instituted and, when the order is made, no obligation to proceed under the Act is imposed. Under paragraph 9, on the other hand, no order can be made until "compensation under this Act has been ascertained," and, finally, whereas under s. 11 the order can be made by any Court of record, orders under paragraph 9 can only be made by the county court judge who would have jurisdiction to entertain the arbitration under the Act.

There are probably other differences between the two classes of orders to which attention could be directed, but I think I have said enough to shew that there are valid grounds for holding with perfect consistency that the one class may fall without and

(1) [1912] 1 K. B. 74.

the other within paragraph 4 of the Second Schedule, and I feel no difficulty in regarding the *Panagotis Case* (1) as perfectly good law and at the same time arriving at the conclusion at which I have arrived, that the preliminary objection in this case is untenable.

H. C. R.

The hearing of the appeal then proceeded.

Sankey, K.C., and *Adshead Elliott*, for the appellants. An approved society has no locus standi to intervene in proceedings for the recording of a memorandum of agreement under paragraph 9 of Sched. II. to the Workmen's Compensation Act, 1906. Such a society is not a "party interested" within the meaning of the paragraph. Those words must, it is submitted, mean "party directly interested," i.e., party to the agreement. It is contended that the society obtains its right to intervene under s. 11 of the National Insurance Act, 1911; but the only alteration made in the law by sub-s. 1 of that section is (1.) that it imposes on the employer the obligation of giving a notice in writing of the agreement within a limited time to the Insurance Commissioners or society or committee concerned, and (2.) that it extends the provisions of proviso (*d*) to paragraph 9 of Sched. II. to agreements as to the redemption of weekly payments by lump sums. The sub-section gives no right to the persons to whom the notice is given to intervene in the proceedings; it merely enables them to ascertain whether the workman is receiving a sum larger than or equal to or less than the benefit to which he is entitled under the Act of 1906, and so to determine whether they are liable to pay him any and if so what sum. By sub-s. 2 of s. 11 the same persons are given a right to intervene if the workman unreasonably refuses to take proceedings to enforce his claim. The Act might have said that an approved society was to be a "party interested" under the Act of 1906, but it has not done so.

The respondent society intervened in the proceedings in the present case under r. 44 (3.) of the Consolidated Workmen's Compensation Rules, July, 1913. It is submitted, however, that

(1) [1912] 1 K. B. 74.

C. A.
1914

BONNEY
v.
JOSHUA
HOYLE
& SONS,
LIMITED.

r. 44 (3.) and any other rule or rules of the Rules of 1913 which purport to give a right to appear and be heard in such proceedings to the Insurance Commissioners or to societies or committees concerned in the administration of benefits to insured persons under the Act of 1911 are ultra vires and invalid. The Rule Committee of the county court judges had no power under paragraph 12 of Sched. II. to the Act of 1906 to make rules defining who were "the parties interested" or the parties to "be deemed to be interested" under the Act. The rules in question alter the law and do not merely provide machinery for carrying out the existing law.

[EVE J. Why do you say that an approved society is not a "party interested" under paragraph 9 of Sched. II. ?]

"Party interested" must mean "party interested" within the meaning of the Workmen's Compensation Act, 1906. What one has to see is who in 1907 were the parties interested in these agreements.

[COZENS-HARDY M.R. Have the Rule Committee power to include in the rules persons who did not come into existence till after the passing of the Act of 1906 ?]

It is submitted they have not. The Act of 1906 gave them power to make rules for carrying that Act in effect, but that power did not extend to enable them to make rules for carrying into effect a subsequent Act. "The power to make rules is to make rules in accordance with the Act and not beyond the Act": per Farwell L.J. in *Sutton* v. *Great Northern Railway* (1); and see also *Powell* v. *Main Colliery Co.* (2) The rules which, it is submitted, are ultra vires were made by the Rule Committee not for the purpose of carrying out the Act of 1906 but of carrying out the Act of 1911. See for example r. 51 (5.) of the Consolidated Rules of 1913 and compare it with r. 49 (4.) of the old rules. The latter rule was sufficient for the purpose of carrying out the Act of 1906. In r. 51 (5.) the Rule Committee have substituted the words "parties interested" for "parties to the agreement" in r. 49 (4.). This alteration was obviously made for the purposes of the Act of 1911 and not of the Act of 1906.

(1) [1909] 2 K. B. 791, 796.

(2) [1900] 2 Q. B. 145.

Comyns Carr (*J. B. Matthews, K.C.*, with him), for the respondent society. The society does not dispute what was said in *Sutton* v. *Great Northern Railway* (1) as to the limits of the powers of the Rule Committee in making rules under the Act of 1906.

It is submitted that an approved society are "parties interested" under paragraph 9 of Sched. II. by virtue of s. 11, sub-s. 2, of the Act of 1911 and r. 44 (3.) of the Consolidated Rules of 1913.

The notice is only to be sent to the society in the event of the agreement being for a less sum than 10*s.* a week. The special importance of such an agreement to an approved society is that it leaves them liable to pay the difference between the amount of the compensation and the amount of the benefit to which the workman is entitled. The advantage to them of the notice is that it would enable them to prevent a collusive agreement by a workman with his employer to take a less sum than that to which he was entitled and so throw on the society the burden of paying a larger sum.

In appearing before the registrar to object to the registration of the memorandum of agreement the respondent society were taking "proceedings" under s. 11, sub-s. 2, of the Act of 1911: *Page* v. *Burtwell.* (2) It cannot be suggested that the workman by appearing before the registrar to enforce the recording of a memorandum would not be taking a "proceeding" under the section, and if that is so, then the "proceeding" was one which the society was entitled to take if he refused. In *Burns* v. *William Baird & Co.* (3) the workman took the proceeding which the society took in this case. Under the sub-section the society may take "proceedings" whether or not the workman objects and may establish their case by independent evidence. "Proceedings" in the sub-section are not confined to legal proceedings, but include steps to enforce a claim.

[SIR SAMUEL EVANS, PRESIDENT, referred to *Macdonald* v. *Fairfield Shipbuilding and Engineering Co.* (4)]

That case was decided on the Act of 1897 and was held in *Burns* v. *William Baird & Co.* (3) to have no application to the Act of 1906.

(1) [1909] 2 K. B. 791.
(2) [1908] 2 K. B. 758.
(3) (1912) 6 B. W. C. C. 362.
(4) (1905) 43 S. L. R. 1.

The words "parties interested" in paragraph 9 mean something wider than "parties to the agreement" and would, for example, include sub-contractors. Insurance companies are only concerned in the matter by contract, but approved societies are bound by the proceedings. They cannot protect themselves by contract or otherwise limit their liability.

It cannot be contended that an approved society cannot give "information" to the registrar under paragraph 9, clause (*d*). If a society did so and the matter of recording the memorandum were referred to the judge it would be a strange thing that the society could not appear before him and support their statements.

Paragraph 12 of Sched. II. gives wider powers to the Rule Committee of making rules than does s. 164 of the County Courts Act, 1888, which restricts their powers to making rules as to procedure.

Rule 44 (3.) of the Consolidated Rules is a rule of procedure only. It makes no new law, but merely provides machinery for carrying out the existing law. It is not therefore ultra vires.

Barrington-Ward and *Harold R. Barker*, for the workman, took no part in the argument.

Sankey, K.C., replied.

Cur. adv. vult.

Jan. 30. The following written judgments were delivered:—

COZENS-HARDY M.R. This appeal raises a question whether upon an application under paragraph 9 of the Second Schedule to the Workmen's Compensation Act, 1906, to record an agreement for the redemption of a weekly payment by a lump sum an approved society under the National Insurance Act, 1911, can make themselves parties to the proceedings and whether the county court judge can order the unsuccessful applicants to pay the costs of the society.

Bonney in November, 1912, met with an accident. Compensation was paid at the rate of 9*s.* 6*d.* a week until February, 1913. From February to April, 1913, Bonney resumed work, and in May, 1913, the workman and his employers made an agreement for the redemption of the weekly payment for 10*l.* On June 7, pursuant to s. 11, sub-s. 1 (*c*), of the National Insurance

Act, 1911, notice was given to the Scottish Legal Health Assurance Society, who objected to the agreement being recorded. The county court judge refused to allow the agreement to be recorded and awarded costs to the approved society. The objection that the society had no locus standi was taken and overruled by the county court judge.

The society were plainly not "parties to the agreement." By r. 49, sub-r. 4, of the old rules the only persons entitled to notice are the parties to the agreement, and they are the only persons entitled to attend. I think that the right of the society must depend solely upon the alterations made in the new Consolidated Workmen's Compensation Rules of 1913, which is identical, for all material purposes, with r. 42, 2 (*a*) of the Rules of 1907—13. Rule 44, sub-r. 3, says that the society for the purposes of paragraph 9 of the Second Schedule to the Act and of these rules shall "be deemed to be parties interested." And by r. 51, sub-r. 5, the registrar is to send notice not merely to the parties to the agreement but to the parties interested. What, then, is the position of the society? By s. 11, sub-s. 1, of the Act of 1911 no benefit is to be paid where compensation is payable under the Workmen's Compensation Act at a rate less than 10*s.* a week or a lump sum is payable the value of which is less than 10*s.* a week without deducting such weekly sum or value, and notice of an agreement for redemption of a weekly payment is to be given to the society. Such notice was given in the present case. There is nothing in that part of the section which confers any greater right upon a society. Indeed, it is remarkable that it is not every order under the Workmen's Compensation Act of which notice has to be given. For example an order on an application to review.

Then we come to sub-s. 2. That again defines accurately and minutely the rights of the society. If the man unreasonably refuses or neglects to take proceedings to enforce his claim for compensation, the society may at its own expense take in the name and on behalf of the man proceedings to enforce his claim. I am clearly of opinion that this sub-section has no application to a case like the present, where there is no neglect or refusal

Cozens-Hardy M.R.

to take proceedings to enforce a claim and where the society is not purporting to oppose, even if it could lawfully oppose, the application to record in the name of the man. The rights expressly conferred upon the society by s. 11 are in my opinion exhaustive.

In my opinion it is not true to say that the society are "parties interested" under paragraph 9, and r. 44, sub-r. 3, so far as it purports to say that they shall be deemed to be parties interested is ultra vires. There is nothing in paragraph 12 of the Second Schedule which authorizes the Committee of county court judges to make any such rule. It follows that in my opinion there was no jurisdiction to award costs to the society. The society, like any busybody, may give "information" under paragraph 9, clause (*d*), which the registrar may or may not think "sufficient." The society does not thereby become a party to the proceedings. In my opinion the appeal, which deals only with this point, must be allowed so far as asked by the notice of appeal. The society must pay the costs of the appeal. I am not aware whether the costs have been in fact taxed and paid. If they have been paid the amount must be refunded.

SIR SAMUEL EVANS, PRESIDENT. In this case an agreement was entered into on May 23, 1913, between the employers and a workman for settling the amount of the balance of compensation to be paid to the workman under the Workmen's Compensation Act—after certain weekly payments had been made—at a lump sum of 10*l.*

A memorandum of the agreement was sent to the registrar of the county court on June 7, 1913, with a request that it should be recorded under paragraph 9 of the Second Schedule to the Act. The workman was an insured person within the meaning of the National Insurance Act, 1911, and was a member of an approved society under that Act, namely, the Scottish Legal Health Assurance Society, who are the respondents in this appeal.

On June 9, 1913, the registrar sent to the society a notice of the request to file the memorandum of agreement, together with a copy of the memorandum in the Form No. 37 of the Forms appended to the Workmen's Compensation Rules, 1907—1909.

On the same day the society, claiming to be a party interested in the agreement, sent to the registrar a notice of objection to the memorandum being recorded.

On June 16, 1913, the registrar gave notice to the employers and to the workman of the society's objection, together with a notice that he refused to record the memorandum and had referred the matter to the judge, and further that the judge had fixed July 15, 1913, for the hearing of the application to record the memorandum.

On July 15, 1913, the county court judge sat to hear the application. The society appeared by a legal representative, and claimed to be heard on the ground that the society was a "party interested" under paragraph 9 of the Second Schedule, and the rules made under the Workmen's Compensation Act.

Objection was taken on behalf the employers that the society had no locus standi.

The county court judge reserved his judgment, and delivered it upon September 15, when he decided that the society had a locus standi, and he made an order for costs in favour of the society.

In his judgment, the judge said that the registrar "acting under rr. 44 and 45 of the Consolidated Workmen's Compensation Rules, 1913, sent a copy of the memorandum to the Scottish Legal Health Assurance Society."

This is inaccurate. The registrar sent the copy memorandum and notice on June 9, 1913. The Consolidated Rules did not come into operation until July 1, 1913.

The notice of objection sent by the society was also before the Consolidated Rules came into operation. At the dates of the two notices just referred to the rules in force were the Workmen's Compensation Rules, 1907—1909, as amended by the Rules of April 7, 1913, which came into operation on May 12, 1913. It is not necessary to examine all these Rules. Assuming that all the notices, forms, &c., were in accordance with the Rules for the time being in force, the substance of the question for decision before us is, Had the society the right to appear as "parties

C. A.
1914

BONNEY
v.
JOSHUA HOYLE & SONS, LIMITED.

The President.

interested," or otherwise as parties, in the proceeding on the hearing before the judge on July 15; and had the judge jurisdiction to make the order for costs in their favour?

It was contended that they were "parties interested," under paragraph 9 of the Second Schedule to the Workmen's Compensation Act, 1906, by virtue of s. 11 of the National Insurance Act, 1911, and r. 44 (3.) of the Consolidated Workmen's Compensation Rules, 1913.

For the respondents (the employers) it was contended on the contrary that they were not "parties interested," and that r. 44 (3.), which says that they "shall for the purposes of paragraph 9 of the Second Schedule to the Act, and of these Rules, be deemed to be parties interested," is ultra vires.

The power to make rules is conferred by paragraph 12 of the Second Schedule.

The phrase "parties interested" is used over and over again in the rules, and to that phrase wherever it occurs r. 44 (3.) of course purports to apply. I shall not attempt to go through the rules and to state whether any of them are wholly or in part ultra vires. (Parenthetically I may observe that I have made a rough calculation of their number, not with profit, but with mixed feelings. There are 101 of them, but these are sub-divided into over 300 sub-rules; and these sub-rules in turn are again sub-divided into numerous sub-heads and provisoes—accompanied by 79 scheduled forms, subject to manifold modifications,—all of which, apart from the difficulties occasioned by the Act itself and its schedules, make an Act, intended to be simple, sufficiently bewildering not only to a practical employer or workman, but to the trained lawyer.)

Although the phrase "party interested" occurs frequently in the rules, it only occurs once in the Act, namely, in the first clause of paragraph 9 of the Second Schedule, which prescribes by whom a memorandum of agreement may be sent to the county court.

Whatever that phrase may mean, I am clearly of opinion that it is wholly incompetent for the Rule Committee of the County Court Judges to lay down by rules what it means, or what it shall be deemed to mean in the Act of Parliament.

The phrase must be construed by the Courts of the realm.

No doubt, for the mere purpose of drafting, the Rule Committee might adopt the expedient of saying that whenever the phrase "parties interested" occurs in their rules it shall mean or include so and so. But that is not what they have purported to do. And if they had only adopted such a drafting expedient, it would still be open to any litigant to contend that a rule was ultra vires if a meaning was attributed to the phrase which had not been attached to it by a competent authority.

In my opinion it is wholly without and beyond the function and competence of the Rule Committee to say that in and for the purposes of the Act of Parliament the Insurance Commissioners or an approved society, or any insurance committee, or any other body or person shall be deemed to be "parties interested."

In so far, therefore, as r. 44 purports to do this it is ultra vires.

This would seem to dispose of all questions arising under rules in which an approved society is deemed to be and treated as "a party interested."

But apart from any question as to the validity of any rule, I will now consider the question of whether an approved society is by virtue of anything contained in the National Insurance Act, 1911, a "party interested" within the meaning of the phrase as used in Sched. II., paragraph 9, of the Workmen's Compensation Act.

I am of opinion that it is not.

Sect. 11 of the National Insurance Act, 1911, requires that in the two specified cases, and in those cases only, notices of agreement as to compensation or as to redemption of a weekly payment by a lump sum are to be sent to the Insurance Commissioners, or to an approved society, or to an insurance committee. Clause (*c*) of sub-s. 1 of the section reads as follows. [His Lordship read clause (*c*) and continued:] It is to be observed that the notice is to be given or sent by the employer, and not by the registrar of a county court, and not in any proceedings in the county court. The notice may be sent either to the Insurance Commissioners, or to the society, or committee concerned. That requirement as to sending such notices does not make an approved society "parties interested," any more than the Insurance Commissioners or committee; and if it did, the employer might by his choice decide which to make the "parties interested." Nothing in this requirement could possibly bring the bodies mentioned within paragraph 9 of the Second Schedule to the Workmen's Compensation Act.

Then it is said that the approved societies are in fact "interested" in agreements made between their insured members and employers relating to compensation for injuries. In one sense, no doubt, an approved society is "interested" in the amount of compensation or in the lump sum agreed to be paid to an insured person in that society. It may be affected financially, and in that sense be "interested," because its liability to pay may be indirectly modified. But many other persons or bodies may be "interested" also financially or otherwise, e.g., an insurance company, or a friendly society or club other than an approved society, a creditor, or even the taxpayer; or the Insurance Commissioners as the head body concerned with the working of the Insurance Act; but such person or bodies cannot be intended to be included in the phrase "parties interested" under the Workmen's Compensation Act so as to be entitled to take part in legal proceedings between an employer and his workman as to what compensation shall be paid for injuries.

Further, as to the suggested operation of s. 11, sub-s. 1 (*c*), it is to be observed that even where approved societies are chosen as the recipients of the notice by the employer, they are not entitled to any notice in many cases where they would be financially affected or interested, e.g., in cases where the agreement is for the workman to be paid over 10*s.* a week, although in such a case the liability of a society to pay would entirely disappear; or where an award (as distinguished from an agreement) is made for payment of compensation; or, even where there was an agreement, in cases where the amount payable is afterwards, upon an application to review, either diminished, increased, or ended.

It was further argued for the society that their intervention before the county court judge on the hearing of this case was authorized by sub-s. 2 of s. 11. Clearly not. The enactment in that sub-section is indeed strong to shew that the proceedings thereby authorized are the only ones under the Workmen's

C. A.
1914

BONNEY
v.
JOSHUA
HOYLE
& SONS,
LIMITED.

The President.

Compensation Act in which an approved society as such is permitted to take any part. I may be permitted to observe, before concluding, that the words in paragraph 9 are "any party interested," and not any *person* interested.

"Person" is a term well-known to the law. It is defined in the Interpretation Act, 1889, s. 2 and s. 19, for the purposes therein referred to. It is to be noted that in s. 2 the words "party aggrieved" are used in connection with any forfeiture or penalty.

No doubt the word "party" is sometimes vulgarly used in the meaning of "person." I am afraid we have heard people say colloquially, and generally irreverently, of others "He (or even she) is an amusing old party, a genteel old party, a dull old party," and so forth. But these are now slang expressions. The Legislature may sometimes be found guilty of bad grammar, but it never descends to slang.

The word "party" on the other hand in legal language takes us at once into the region of agreements, settlements, suits, applications, and other legal proceedings. One of the meanings given to it in a standard modern dictionary is, "One expressly concerned or interested in an affair; as a party to a contract, or an agreement; the party of the first part." The words "any party interested" were no doubt advisedly used instead of "any person interested."

It is not necessary in this appeal to define exactly what the phrase "party interested" in paragraph 9 of Sched. II. means. It probably means or includes a party called upon to pay, or entitled to receive, the compensation or weekly payment, or a party to any matter decided, or a party to an agreement or entitled under an agreement, or a party claiming to be beneficially entitled to any part of the compensation or sum to which the agreement relates. This is not intended as an exhaustive definition. It must I think refer to some party directly interested in the matters referred to in the first clause of paragraph 9, and not to any person or body who might be indirectly affected but who need not be consulted at all in reference to any question relating to compensation for injuries between employer and workman or his dependants.

C. A.
1914

BONNEY
v.
JOSHUA
HOYLE
& SONS,
LIMITED.

The President.

Whatever the phrase includes, I am clearly of opinion that it does not comprise, and cannot under the Act be applied to, an approved society created or existing under the National Insurance Act.

The county court judge therefore had no jurisdiction to allow the society to appear as a party to the proceedings before him on July 15, and had no power or authority to make the order for costs which he made in favour of the society. The order of the county court judge therefore must be set aside, and the appeal allowed with costs here and below.

Eve J. On May 25, 1913, an agreement was come to between Joshua Hoyle & Sons, Limited, and Frederick Bonney, a workman who in the previous November had met with an accident arising out of and in the course of his employment by them, whereby the employers agreed to pay and the workman to accept the sum of 10*l.* by way of a lump sum and as the amount of the compensation payable to the workman under the Act, which sum together with the weekly payments theretofore made by the employers to the workman the workman thereby accepted in full satisfaction and discharge of all claims under the Act by reason or on account of the said accident.

The workman was an insured person within the meaning of the National Insurance Act, 1911, the society concerned in the administration of the benefit to which he was entitled under that Act being the Scottish Legal Health Assurance Society.

Pursuant to clause (*c*) of sub-s. 1 of s. 11 of the National Insurance Act, 1911, the employers sent to the society notice in writing of the agreement, and on June 7, 1913, the employers and workman sent a joint memorandum thereof to the registrar of the county court to be registered in accordance with paragraph 9 of the Second Schedule to the Workmen's Compensation Act, 1906.

On June 9 the registrar, purporting to act under r. 43 of the rules then in force under the Compensation Act, being the rules which came into operation on May 12, 1913 (see [1913] W. N. p. 216), sent to the society a copy of the memorandum and a notice in the form numbered 37 in the Appendix attached to the Rules.

To this notice the society replied by a notice in the form numbered 38 objecting to the memorandum being recorded on the ground that the compensation was inadequate, and on June 16 the registrar refused to record the memorandum on this ground and referred the matter to the judge under clause (*d*) of paragraph 9.

At the hearing before the judge on July 15 the society claimed to be heard. Objection was taken on behalf of the employers, and after full argument the judge decided that the society was entitled to be heard, overruling the objection, and ordering the employers to pay the society's costs.

The employers appeal against this decision and in effect ask this Court to declare that the society was not entitled to be heard before the learned judge and had no locus standi in the proceedings before him under paragraph 9.

The question falls to be decided mainly on the proper construction of the expression "the parties interested" in paragraph 9. I say "mainly," because the society further contends that even if it is not "a party interested" under that paragraph it has nevertheless statutory rights under the Insurance Act sufficiently wide to entitle it to a hearing not only on applications under clause (*d*) but on all occasions when the claim of the insured person under the Compensation Act is being ascertained, settled, or reviewed.

It will be convenient, I think, to deal with this latter point first. It is based on sub-s. 2 of s. 11 of the Insurance Act, which, so far as is material, reads as follows: "Where an insured person appears to be entitled to any such compensation" (that is, compensation under the Workmen's Compensation Act) "and unreasonably refuses or neglects to take proceedings to enforce his claim, it shall be lawful for the society . . . . concerned . . . . at its own expense to take in the name and on behalf of such person such proceedings." In my opinion it is impossible to impose on that sub-section the construction contended for by the society, and it would be a matter of regret if it were possible. Such a construction would justify the introduction into every application involving the question of compensation claimed by or payable to an injured workman—being also an insured person—of a third party whose function it would be to see that the insured person insisted on obtaining or retaining, as the case might be, the full measure of compensation to which he was in the view of that third party entitled. There is nothing in the sub-section to justify any construction calculated to bring about such a result as this. On the contrary the opening words of the sub-section "Where an insured person appears to be entitled to any such compensation" and the provisions as to "taking proceedings" and using "the name of such person" all combine to shew that the sub-section is directed to a state of things antecedent to the initiation of proceedings, and in my opinion it deals only with the proceedings for the recovery of compensation under s. 2 of the Compensation Act.

Reverting to the first point taken on behalf of the respondent society that it is "a party interested" within the meaning of paragraph 9 of the Second Schedule I do not think this contention is well founded.

Regarding the matter apart from the Insurance Act I should say that the expressions in paragraph 9 "any party interested" and "the parties interested" include and are confined to persons who are parties to the agreement or intended to be bound thereby, such for example as dependants and, possibly, persons liable under sub-s. 2 of s. 6 of the Act to indemnify the payer of compensation. There is, in my opinion, nothing in paragraph 9 to extend the meaning of the phrases to persons whom it is not sought to bind by the agreement but who nevertheless may be affected pecuniarily by its being come to, and unless there is some enactment in the Insurance Act constituting the society a party interested within paragraph 9 the decision of the learned county court judge cannot in my view be upheld. On this part of the case the respondents rely on clause (*c*) of sub-s. 1 of s. 11 of the Insurance Act. That clause, it is admitted, does not in terms enact that the society is or is to be deemed to be a party interested within the meaning of paragraph 9, but it is urged that its obvious intention is to give the society an opportunity of being heard in cases where the agreement fixes the compensation at a figure which involves a supplementing of the amount by a contribution from the society. To some extent this is true, though if this were the real object of the clause it is very difficult to appreciate why it was not extended to cover cases where the compensation is fixed at less than 10*s*. a week by an award made either on the first reference or on a review. But this much the clause does effect—the notice of the agreement brings home to the society the fact that the case is one in which the society's funds will be called upon, and affords its officials the opportunity of investigating matters with a view, if the occasion demands, of laying before the registrar information on which he may under clause (*d*) of paragraph 9 decline to register the memorandum. Further than this it does not in my opinion go—it falls short altogether of enacting either directly or indirectly that the society can intervene in the proceedings under paragraph 9 except to the limited extent which I have indicated by supplying information to the registrar, and I think on this conclusion we are bound to hold that r. 44, sub-r. 3, of the Consolidated Workmen's Compensation Rules, July, 1913, imposes a construction on the clause with which I have been dealing and paragraph 9 to which they do not bend.

For these reasons I think the decision below cannot be sustained and the appeal must be allowed. The costs here and below must be paid by the society and the matter must go back to the judge to be adjudicated upon in the presence of the proper parties.

Appeal allowed.

Solicitors: *Rawle, Johnstone & Co., for John Taylor, Blackburn and Manchester; Pritchard, Englefield & Co., for Butcher & Barlow, Bury; Kingsley Wood & Co., for Maclay, Murray & Spens, Glasgow.*

NOTE.—Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. II., par. 4: "The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but a committee or an arbitrator may, if they or he think fit, submit any question of law for the decision of the judge of the county court, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, or where he gives any decision or makes any order under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by Rules of the Supreme Court either party appeals to the Court of Appeal; and the judge of the county court, or the arbitrator appointed by him, shall, BONNEY v. JOSHUA HOYLE & SONS, LIMITED.

for the purpose of proceedings under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the proceedings were an action in the county court."

Par. 9: "Where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of Court, by the committee or arbitrator, or by any party interested, to the registrar of the county court who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a county court judgment.

"Provided that—

"(*a*) no such memorandum shall be recorded before seven days after the despatch by the registrar of notice to the parties interested; and

. . . . .

"(*d*) where it appears to the registrar of the county court, on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum, or an agreement as to the amount of compensation payable to a person under any legal disability, or to dependants, ought not to be registered by reason of the inadequacy of the sum or amount, or by reason of the agreement having been obtained by fraud or undue influence, or other improper means, he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the judge who shall, in accordance with rules of Court, make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just; . . . ."

Par. 12: "The duty of a judge of county courts under this Act, or in England of an arbitrator appointed by him, shall, subject to rules of Court, be part of the duties of the county court, and the officers of the Court shall act accordingly, and rules of Court may be made both for any purpose for which this Act authorises rules of Court to be made, and also generally for carrying into effect this Act so far as it affects the county court, or an arbitrator appointed by the judge of the county court, and proceedings in the county court or before any such arbitrator, and such rules may, in England, be made by the five judges of county courts appointed for the making of rules under section one hundred and sixty-four of the County Courts Act, 1888, and when allowed by the Lord Chancellor, as provided by that section, shall have full effect without any further consent."

National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55):

Sect. 11.—"(1.) Where an insured person has received or recovered, or is entitled to receive or recover, whether from his employer or any other person, any compensation or damages under the Workmen's Compensation Act, 1906, or any scheme certified thereunder, or under the Employers' Liability Act, 1880, or at common law, in respect of any injury or disease, the following provisions shall apply:—

"(*a*) No sickness benefit or disablement benefit shall be paid to such person in respect of that injury or disease in any case where any weekly sum or the weekly value of any lump sum paid or payable by way of compensation or damages is equal to or greater than the benefit otherwise payable to such person, and, where any such weekly sum or the weekly value of any such lump sum is less than the benefit in question, such part only of the benefit shall be paid as, together with the weekly sum or weekly value of the lump sum, will be equal to the benefit:

"(*b*) The weekly value of any such lump sum as aforesaid may be determined by the society or committee by which the sickness and disablement benefits payable to such person are administered, but, if the insured person is aggrieved by such determination, the matter shall be settled in manner provided by this Part of this Act for settling disputes between insured persons and societies or committees:

"(*c*) Where an agreement is made as to the amount of such compensation as aforesaid, and the amount so agreed is less than ten shillings a week, or as to the redemption of a weekly payment by a lump sum, under the Workmen's Compensation Act, 1906, the employer shall, within three days thereafter, or such longer time as may be prescribed, send to the Insurance Commissioners, or to the society or committee concerned, notice in writing of such agreement giving the prescribed particulars thereof, and proviso (*d*) to paragraph (9.) of the Second Schedule of the Workmen's Compensation Act, 1906 (which relates to the powers of registrars of county courts to refuse to record memoranda of agreements and to refer the matter to the judge) shall, in cases where the workman is an insured person, apply to agreements as to the amount of compensation in like manner as to agreements as to the redemption of weekly payments by lump sums.

"(2.) Where an insured person appears to be entitled to any such compensation or damages as aforesaid and unreasonably refuses or neglects to take proceedings to enforce his claim, it shall be lawful for the society or committee concerned, either—

"(*a*) at its own expense, to take in the name and on behalf of such person such proceedings, in which case any compensation or damages recovered shall be held by the society or committee as trustee for the insured person; or

"(*b*) to withhold payment of any benefit to which apart from this section such person would be entitled.

"In the event of the society or committee concerned taking proceedings as aforesaid and failing in the proceedings, it shall be responsible for the costs of the proceedings as if it were claiming on its own account.

"(3.) Nothing in this section shall prevent the society or committee paying to an insured person benefit by way of advance pending the settlement of his claim for compensation or damages, and any advance so made shall, without prejudice to any other method of recovery, be recoverable by deductions from or suspension of any benefits which may subsequently become payable to such person."

C. A.
1914

BONNEY
v.
JOSHUA
HOYLE
& SONS,
LIMITED.

Consolidated Workmen's Compensation Rules, July, 1913:

Rule 44 (3.): "Where an agreement is made as to the amount of compensation payable in the form of a weekly payment or of a lump sum to a workman who is an insured person within the meaning of the National Insurance Act, 1911, or as to the redemption by a lump sum of a weekly payment to a workman who is such an insured person, the Insurance Commissioners, or the society or committee concerned in the administration of any benefit to which such insured person is entitled under the last mentioned Act, shall for the purposes of paragraph 9 of the Second Schedule to the Act, and of these Rules, be deemed to be parties interested."

Rule 51 (5.): "If on consideration of the registrar's report it appears to the judge that the memorandum should not be recorded without further inquiry, the registrar shall send notice to the parties interested according to the form in the Appendix, informing them that he has referred the matter to the judge, and requiring them to attend on a day to be named in the notice, when the matter will be inquired into by the judge."

W. I. C.

C. A.
1914
Jan. 21.

[IN THE COURT OF APPEAL.]

REEVES *v.* POPE.

[1912 R. 1657.]

Landlord and Tenant—Claim by Tenant against Lessor for Damages for Breach of Contract—Mortgage of Reversion—Notice to Mortgagor of Tenant's Claim—Action by Mortgagees in Possession for Rent—Right of Tenant to set off Damages claimed from Lessor.

A building company entered into an agreement with the defendant to erect and complete an hotel so as to be ready for occupation by a certain date, and the defendant agreed to take a lease of the hotel for twenty-eight years at a specified rent, as soon as it was ready for use. The building company made default in completing the hotel, but on its subsequent completion the defendant accepted a lease for the stipulated term without prejudice to any claim for damages for breach of the agreement. The company, who had obtained a head lease of ninety-nine years from the freeholder, mortgaged the same to the plaintiffs. In an action by them, as mortgagees in possession, against the defendant for arrears of rent accrued since the date of the mortgage, the defendant sought to set off a claim for damages in respect of the company's default in not completing the hotel by the specified time, and alleged that the mortgage was taken by the plaintiffs with full notice and knowledge of that claim:—

Held (affirming the decision of Bankes J., [1913] 1 K. B. 637), that inasmuch as the right attempted to be set off was not an interest in land, but merely a claim for damages for breach of a personal covenant, the claim to set off could not be allowed.

The cases as to set-off by an assignee of a chose in action had no application to the present case.

Barnhart v. Greenshields (1853) 9 Moo. P. C. 18, explained.

APPEAL from a decision of Bankes J. (1) upon a point of law raised on the pleadings. The plaintiffs' claim in the action was as mortgagees in possession of certain premises for arrears of rent amounting to 1059*l*. 19*s*. 7*d*. due from the defendant under a lease. The question arose under the following circumstances.

On January 25, 1910, Lord Clanricarde, who was the owner in fee of land in Berkeley Street, in the parish of St. George's, Hanover Square, entered into a building agreement with the London and Northern Estates Company under which the company were to build an hotel upon the site of No. 19, Berkeley Street, and he agreed to grant them a lease of the hotel when built. On the next day, January 26, 1910, the company entered into an agreement with the defendant, Laura Margaret Pope, whereby the company agreed to erect the hotel and complete it so as to be ready for occupation and use, to the reasonable satisfaction of the defendant's architect, by Lady Day, 1911, and the defendant agreed to take a lease of the hotel for a term of twenty-eight years at a rent of 2600*l*. per annum, the rent to commence on May 10, 1910, or as soon thereafter as the hotel should be ready for use; and it was provided that, if the building was not completed to the satisfaction of the architect by the date fixed, the defendant should have the option of refusing to complete the lease. The company were in default in performance of their agreement, and the hotel was not actually completed and ready for occupation until November 13, 1911, on which date the defendant accepted a lease from the company in pursuance of her agreement, but without prejudice to any claim for damages in respect of the breach of the agreement by the company. Meanwhile, on November 3, 1911, Lord Clanricarde had granted a lease of the premises to the London and Northern Estates Company for a term of ninety-nine years, and on November 16, 1911, the company mortgaged this lease by way of sub-demise for the whole term, less three days, to the plaintiffs, Herbert Kempson Reeves and Hugh William Reeves, who were their solicitors. On October 9, 1912, the plaintiffs went into possession of the premises, and on the same day gave notice of their mortgage to the defendant. At that time there was due from the defendant a considerable sum for rent under her lease, from November 13, 1911, to Michaelmas, 1912. On October 11, 1912, the plaintiffs commenced this action for arrears of rent as mortgagees in possession and entitled to the reversion on the defendant's lease. By her counter-claim, the defendant sought to set off her claim for damages in respect of the breach of the agreement of January 26, 1910, by the London and Northern Estates Company, and alleged that the plaintiffs, when they took their mortgage, had full notice of her claim and became assignees of the reversion on the implied condition of discharging the company's liability to the defendant under the agreement. The plaintiffs replied that even if they had possessed the alleged knowledge, which was denied, they were not liable in law, and no such condition as alleged could be implied.

---

(1) [1913] 1 K. B. 637.

The question of law was directed to be tried before the hearing of the action, and Bankes J. held that the set-off could not be allowed.

The defendant appealed.

J. D. Crawford and *Harold Simmons*, for the appellant. The appellant is entitled to the set-off claimed inasmuch as the plaintiffs, the mortgagees in possession, acquired their rights with full notice and knowledge of the claim by the plaintiffs: *Allen* v. *Anthony*. (1) If a person purchasing property, when there is a tenant in possession, neglects to inquire into the title, he takes subject to any rights which the tenant may have: *Daniels* v. *Davison* (2); *Green* v. *Reinberg* (3); *Barnhart* v. *Greenshields*. (4)

[BUCKLEY L.J. This right which is claimed is not an interest in the land.]

The obligation by the plaintiff to pay rent and the obligation of the building company to pay damages for breach of their agreement arose out of the same transaction. It was a breach of contract to do something upon the land. Unliquidated damages can be set off as between the original parties, and as against an assignee, if connected with the transactions which gave rise to the assignment: *Young* v. *Kitchin* (1); *Government of Newfoundland* v. *Newfoundland Ry. Co.* (2)

---

(1) (1816) 1 Mer. 282.
(2) (1809) 16 Ves. 249.
(3) (1911) 104 L. T. 149.
(4) 9 Moo. P. C. 18.

Hohler, K.C., and *G. F. Mortimer*, for the respondents, were not called upon.

LORD READING C.J. This is an appeal from a judgment of Bankes J. given at the hearing on a point of law which arose upon a counter-claim set up by the appellants against the mortgagees in possession who were claiming rent. At first the point was raised that, even assuming the facts as set forth in the counter-claim to be true, namely, that the plaintiffs, who were the mortgagees in possession, were in substance cognizant of all the facts giving rise to the claim which the defendant contended she had against the mortgagor, still no ground of action was shewn in the counter-claim. That matter came before the Court of Appeal, and the Court of Appeal made an order that it should be disposed of as a preliminary point of law. Thereupon the matter came before Bankes J., and in spite of the ingenious argument strenuously put forward by Mr. Crawford, in my opinion that judgment of Bankes J. is quite unassailable. It is perfectly plain that we are not dealing here with the right to set off against the assignment of a chose in action, in which event quite different principles apply: in regard to that right Mr. Crawford may be correct in the view for which he has contended before us, for which he has cited the authority of *Government of Newfoundland* v. *Newfoundland Ry. Co.* (3) and *Young* v. *Kitchin.* (1)

But that is not the real question in this case. The whole point depends upon whether or not Mr. Crawford is right in saying that his client would be entitled to set off this claim, notwithstanding that it is not an interest in land. That is the whole matter in dispute. If what his client had was an interest in land which he desired to set off against the mortgagees in possession, no doubt the cases which he has quoted are in point as authorities for that proposition; but the moment it is ascertained that in this case the claim is not an interest in land, but if established is merely a right to damages against the mortgagor for breach of an agreement made in respect of, or in connection with, the land, it becomes apparent that those cases have no application. Mr. Crawford's difficulty which he resolutely faced was that the authorities, examined and considered closely, are confined entirely to cases in which the right which it is attempted to set off is an interest in the land. It is perfectly true, as is shewn by a reference to the judgments, that there are some expressions which, taken by themselves, and leaving out altogether the matter with which the Court was dealing, might be wide enough to cover the proposition for which Mr. Crawford has contended, but a little examination shews perfectly plainly that the Court, in laying down the proposition in those cases, never intended to go so far as Mr. Crawford now suggests. Indeed, the case of *Allen* v. *Anthony* (1) which was first cited was quite clearly dealing with an interest in land —that is, with the timber which was on the land. The observations of Lord Eldon are confined entirely to the circumstances of the case which he was then considering.

---

(1) (1878) 3 Ex. D. 127.

(2) (1888) 13 App. Cas, 199, 213.

(3) 13 App. Cas. 199.

The other case *Barnhart* v. *Greenshields* (2) contains words which, taken by themselves, and apart from the rest of the case, and also from the facts with which the Court was then dealing, would be certainly wide enough to cover the proposition. But as Buckley L.J. has pointed out, they must be read as if the words at p. 32 after " A purchaser is bound by all the equities which the tenant could enforce against the vendor" were "in the land." On p. 33, the Court, dealing with the proposition which it was then intending to lay down, quotes the rule stated in the same way by Sir James Wigram in his elaborate judgment in the case of *Jones* v. *Smith* (3), and this is the rule there quoted: " If a person purchases an estate which he knows to be in the occupation of another than the vendor, he is bound by all the equities which the party in such occupation may have in the land," and referring to the authorities which I have mentioned, Sir James Wigram adds: "for possession is prima facie evidence of a seisin in fee." That is there stated to be the rule, and it is, I think, an accurate proposition, and it is the full extent to which that proposition can be driven. The moment it is obvious from the facts that the right in respect to which this counter-claim is set up is not an interest in the land, but is only a claim for damages for breach of a personal covenant, the authorities are not in point, and do not support Mr. Crawford's contention, and the judgment of Bankes J. is correct.

---

(1) 1 Mer. 282.
(2) 9 Moo. P. C. 18, 32, 33.
(3) (1841) 1 Hare, 43, 60.

I would only observe that Bankes J. seems to have taken the view that what was sought to be established when this case was before him was that this claim was to be treated just as if it had been a right of set-off against the assignee of a chose in action. That is an unsound proposition. It must be confined to the case to which I have already drawn attention. I do not think that any assistance is got by reference to the later cases. They are all upon the same principle; they all assert the same, and no greater, right. The decision of Bankes J. is, in my view, quite correct, and this appeal must be dismissed.

BUCKLEY L.J. I am of the same opinion, and for the same reasons. From the report of the case below it is plain that it was argued before the learned judge upon the footing that the mortgagees were assignees of the mortgagor's right to receive this rent, and they were asserting that the rent which was transferred was a chose in action and that there were such rights as would arise if the case had been one of the assignment of a chose in action. That was wholly misconceived.

The mortagees were entitled, as mortgagees, to the reversion expectant on the determination of the lease under which the defendant held, and as such mortgagees they were entitled in their own right to enforce payment of the arrears of rent. They were not assignees of the rent; they were persons claiming to enforce payment of the rent as entitled thereto as mortgagees; they could have distrained for the rent. They were asserting a legal right to rent which was due to them as owners of the reversion expectant upon the term. The argument before us started, I think, upon a similar line, but it soon became obvious that that could not be maintained. Then it was said that there was a right of set-off by reason of the fact that the damages in question were damages arising from a breach of contract to do something upon the land within a time.

Now, that, I conceive, is wholly a misconception. The doctrine is this—that, whether there be a purchaser or mortgagee (it does not matter which), and the purchaser or mortgagee finds a tenant in possession, he is bound to assume that the tenant in possession has some interest in the land. He may inquire what it is, or forbear to inquire, as he thinks proper, but if he does not inquire he must give effect to it, whatever the interest in point of fact is. Now, is that doctrine confined entirely to the interest of the tenant in the land? All that these mortgagees knew was that there were such facts as that the tenant was saying "I have a personal right against the mortgagor to damages in respect to his having failed to perform some obligation which lay upon him to do something upon the land." That, of course, created no incumbrance on the land at all. Those damages were not any incumbrance on the land, and the right to them was no estate or interest in any way in the land. The damages in question, therefore, are not within the principle which is to be found in and perfectly indisputably established by the cases which have been cited to us.

I do not think I can improve upon the judgment which has been delivered by Bankes J. I think it perfectly right, and this appeal must be dismissed.

PHILLIMORE L.J. I am of the same opinion. Neither the argument of the defendant in the Court below, nor the more ingenious and subtle arguments of the appellant in this Court, have in the least affected my judgment in this case, and I have nothing to add to what has been said by the other members of the Court and the judge below.

Appeal dismissed.

Solicitors: *Bullock & Co.; Herbert Reeves & Co.*

G. M.

[IN THE COURT OF APPEAL.]

C. A.
1914
Jan. 30.

SNELL *v.* MAYOR, &c., OF BRISTOL.

Employer and Workman—Compensation—Basis of Calculation—"Average weekly earnings"—Casual Labourer—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (1—3).

A docker employed in casual labour as a grain porter by the respondents was incapacitated by injury from an accident arising out of and in the course of his employment. In an arbitration under the Workmen's Compensation Act, 1906, the county court judge found that the average weekly earnings during the twelve months previous to the accident of a man in the same grade employed at the same work as the applicant were 25*s.*, and he awarded him compensation at the rate of 12*s.* 6*d.* a week. It was proved that the applicant was exceptionally good at his work and was able to earn the highest wages of such men in the port of Bristol; and that during the twelve months preceding the accident he had earned wages at the rate of 2*l.* a week, but not in the employment of the same employer:—

Held, on appeal, that the proper method of assessing the weekly payment in such a case was not to ascertain the amount of the average weekly earnings of men employed in the same class of work as the applicant and to award him 50 per cent. of that amount. The arbitrator must have regard to the personal qualifications of the individual workman, whether he was above or below the average, and if his actual earnings during the past year, or any other evidence, shewed that he was in fact above the average, that must be regarded.

Appeal from an award of the judge of the Bristol County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

John Snell, the applicant in this case, was a casual dock labourer employed as a grain porter in the port of Bristol. On July 1 while working for the Bristol Docks Committee he met with an accident whereby he was incapacitated for work for a fortnight, in respect of which he claimed compensation under the Act. At the hearing of the arbitration he proved that his average weekly earnings as a dock labourer were over 2*l.* a week. He was not constantly employed by the docks committee, and in fact worked more frequently for other firms. It was attempted to be proved that among the dock labourers there was a separate and distinct grade of men who, being good workers, were given

C. A.
1914

SNELL
v.
BRISTOL
CORPORATION.

work by the employers in preference to their fellows, and whose average weekly earnings were over 2*l.* a week; and that the applicant was classed in this grade. The county court judge held that no such grade was established, and that the average weekly earnings during the twelve months previous to the accident of men employed at the same work as the applicant were 25*s.* a week; but that during the same period the applicant had in fact earned 2*l.* a week. Upon these findings he awarded the applicant compensation at the rate of 12*s.* 6*d.* a week, being 50 per cent. of the average weekly earnings of men employed in the same class of work.

The applicant appealed against the award on the ground that the county court judge had not taken into consideration the applicant's personal qualifications, and had not therefore computed his average weekly earnings in such manner as was "best calculated to give the rate per week at which he was being remunerated."

Holman Gregory, K.C., and *C. L. Chute*, for the appellant. It was contended before the county court judge that the appellant belonged to a separate grade of workmen, but that was negatived by the finding of the county court judge, and as to that no doubt the learned judge was right; where he went wrong, however, was in disregarding altogether the personal element connected with this man's work. He did not consider, as it was held in *Perry* v. *Wright* (1) he ought to do, whether the appellant as an individual workman was an average workman, or was above or below an average workman. Here it was proved by the amount of wages the man was actually earning during the preceding twelve months that he was above the average, and yet the county court judge has computed the compensation upon the basis of the average wages earned by casual dock labourers without having regard to the personal qualities of the man as an individual workman.

It was not impracticable at the date of the accident to find this man's average weekly earnings, because on the evidence he was actually earning 2*l.* a week, and yet the county court judge has

(1) [1908] 1 K. B. 441.

only given him 12*s.* 6*d.*, i.e., 50 per cent. of 25*s.*, a week, which it is submitted was wrong. Nothing is better calculated to give the rate per week at which the workman has been remunerated than to ascertain what he has in fact been earning.

Inskip, for the respondents. The award in this case was quite right.

[COZENS-HARDY M.R. The county court judge was not bound to give 50 per cent. of the average weekly earnings, but he has purported to do so, and if he has not properly arrived at the average weekly earnings, ought his award to stand?]

The man was working as a casual grain porter and the county court judge was right in having regard to the average rate at which men in such employment were being remunerated: *Perry* v. *Wright.* (1) It was impracticable by reason of the casual character of the employment to compute fairly the rate of remuneration. It would not have been right for the learned judge to look only at what the man was earning from the docks committee. He had to look also at what other men working in the same class of employment earned. What was chiefly argued in the Court below was whether there was a distinct grade of these men who were able to earn a higher rate of wages than the average men. The evidence was mainly directed to that. The learned judge was right in the view that he was only entitled to take the average wage at which the man was being remunerated in the employment at which he was working.

[COZENS-HARDY M.R. You are right in saying that the actual earnings of the man with various employers during the twelve months is not the test.

SIR SAMUEL EVANS, PRESIDENT, referred to the judgment of the Master of the Rolls in *Barnett* v. *Port of London Authority.* (2)]

The arbitrator is not bound to take into consideration the personal qualifications of the workman, but he may do so. It cannot be right in every case of casual employment to add up the number of days the man has worked and the wages which he has earned and then to divide that by the proper divisor and

---

(1) [1908] 1 K. B. 441.

(2) [1913] 2 K. B. 115, 120.

Snell
v.
Bristol
Corporation.

take the result as the rate of wages at which he was being remunerated at the time of the accident.

[Eve J. If the man has been employed at a high wage for a short period it would not be fair, but if he is regularly employed during the whole period, does not a simple mathematical calculation fairly give the average rate of remuneration ?]

If you are entitled to take everything which the casual labourer earns during the previous twelve months, then it is never "impracticable" to ascertain the average weekly earnings.

[Cozens-Hardy M.R. It is found as a matter of fact that this man was earning more than the average wage of men of his class, and that ought not to be disregarded.]

The learned judge did not disregard it because he gave him the maximum, 50 per cent. of the average.

[Cozens-Hardy M.R. In *Barnett* v. *Port of London Authority* (1) the view of the whole Court was that it is for the county court judge in abnormal circumstances to decide what were the average weekly earnings of the workman, and for that purpose he is entitled to take into consideration "the nature of the employment, its terms and duration, and the personal qualifications of the workman." The learned county court judge has overlooked that.]

The submission is that he did take into consideration those matters, and that he has correctly computed the amount of the compensation in this case.

Cozens-Hardy M.R. This case has taken rather a difficult and unfortunate shape because of the position assumed by the workman's advisers in the Court below. The man here, Snell, was a grain porter in casual employment : he was incapacitated only for a fortnight, and the question arose on what principle his average weekly earnings were to be based. In the first place, the learned county court judge seems in terms to have laid down the principle that the workman is entitled to one half of his average weekly earnings. That is wrong. He cannot give more than half of the average weekly earnings, but there is no obligation on the learned county court judge to give the full half, and it is wrong to say that a man is entitled to half of his weekly earnings. Then it was argued in the Court below, as I understand it, not that you were to take the man's actual earnings during the year, but you must have regard to the fact that there was a distinct grade among the porters, a preferred grade, and it was said that the average earnings of men in that grade were 2*l.* a week. A number of witnesses were called to prove that, but the learned county court judge decided, and it is admitted that that cannot be interfered with, that there was no such grade as the applicant relied upon; and therefore the bulk of the evidence which was given on behalf of the applicant was altogether misconceived and irrelevant. Then it was said for the corporation that all that must be looked at was what were the average earnings in the last twelve months of a man in the ordinary grade, including all classes of corn porters. The learned judge heard evidence, and I see no reason to doubt that the figure which he arrived at in ascertaining the average was the average of the best men and those below, that in point of fact it was an average in the true sense of the word. Then the learned judge seems to have said: "The only question is what was the average that is what I must find; the average is 25*s.*, and the man being entitled to half that sum I will award him 12*s.* 6*d.*" So far as I can make out, he did not have regard to the personal qualifications of the individual workman. Those personal qualifications may be such as to establish that he is either above the average or below the average; and it is for anybody who says that the man is either above or below the average to make out that case. How is that to be proved? It is to be proved in various ways according to the circumstances. Evidence might be called to say that he is a better man than the average of his class, he is worth more, and in the market would certainly get more. Another element which cannot be disregarded is the fact that his earnings during the past year support that contention and shew that he is in fact a man who is above the average. The learned judge really seems to have thought that the only question was: Is it to be 12*s.* 6*d.*, which is half the average, or is it to be the half of 2*l.*, which the man himself had earned during the previous twelve months? That, I think, is not the test. Those earnings are

---

(1) [1913] 2 K. B. 115, 120.

C. A.
1914

Snell
v.
Bristol
Corporation.

Cozens-Hardy
M. R.

elements which may be taken into consideration, and that is all. If it had been necessary to send this case back I think it would have had to go back on the ground that the learned county court judge apparently thought that the man was entitled to half his wages, and also on the ground that he did not have regard to the personal elements of the case; but the parties have had the good sense to leave it to this Court, and, that being so, I think the award must be altered, the result of which will be to give the man 7*s.* 6*d.* a week more, i.e., 15*s.* in all.

Sir Samuel Evans, President. I am of the same opinion. As the Master of the Rolls has said, the learned county court judge is not bound to give 50 per cent. of the average weekly earnings, but it must be taken for the purposes of this case that the learned county court judge decided to give 50 per cent. of the average weekly earnings when the earnings are properly ascertained, and the question, therefore, is whether or not he arrived at the proper sum of which the 50 per cent. should be given. There was much discussion in the Court below turning upon an attempt which was made to shew that there was a special grade of preference men in the docks. That attempt failed, but the long discussion upon that topic probably accounts in some measure for the way in which the learned county court judge has gone wrong in this case. The learned judge decided and properly decided, as is admitted on this appeal, that there was no special grade at all outside the ordinary grade of corn porters, to which this man might be allocated. Thereupon he proceeded to determine what the amount of the average weekly earnings was, in order to take 50 per cent. of that, as he had decided to do; and he apparently came to the fixed conclusion that what he had to do was to ascertain the average weekly earnings of men in that particular work without any regard to any other circumstances whatsoever. I quite agree with Mr. Inskip that the 25*s.* which was ascertained by the learned county court judge was taken as an average of the whole, and that what were called the good men and their wages were not excluded, but the question is whether the learned county court judge was right in confining himself to giving 50 per cent.

of the average weekly earnings of all sorts of corn porters. I think he was quite wrong, both according to the decisions and principles laid down by this Court.

The case of *Barnett* v. *Port of London Authority* (1) lays down the principle perfectly clearly. There the Master of the Rolls said, in dealing with the general principle before he began to deal with the particular facts of the case which was then under appeal, "As was pointed out in *Perry* v. *Wright* (2), the dominant principle is to be found in the first sentence, namely, 'Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated.'" Then he adopts a passage from a Scotch case, *Carter* v. *Lang* (3), in which this sentence appears: "It must be settled in each case by a consideration of the whole circumstances of the employment." Then in the second paragraph on p. 121 he says: "The word 'impracticable,' as was pointed out by Farwell L.J. in *Jury* v. *Owners of Steamship Atlanta* (4), 'must mean impracticable to arrive at a fair computation, for it is never impracticable to make some arithmetical calculation with some result.' Whenever the time is too short, or the casual nature of the employment is such as to make a strict mathematical computation 'impracticable'—of which the arbitrator is the judge—the arbitrator must do the best he can, and he '*may*,' not must, have regard to the earnings of persons in the same grade." It may be practicable for the arbitrator in cases of casual labour, as I think it was in this case for the learned judge, to make a fair computation of what the average weekly earnings were. In the judgment of the learned Master of the Rolls, on p. 122, there is a passage which sums up the matter perfectly clearly; he says: "Microscopical accuracy is not required, and indeed is seldom possible in computing average weekly earnings. The nature of the employment,"—now it was casual employment with which the Master of the Rolls was dealing—"its terms, its actual duration, and the personal qualifications of the workman may all be taken into consideration by the arbitrator." Now, the arbitrator in this case excluded from his consideration, so far as I can see, practically all these matters which are here said to be matters to be taken into consideration. He certainly did not take into consideration the duration of the employment of this man, nor his qualifications. The qualifications of the man were described, and were adopted and believed, by the learned county court judge. One of the witnesses says this: "If I were a foreman I should consider Snell to be one of the most reliable men. Snell represents a type or class or grade of men who earn the highest wages in the port of Bristol because he is able and temperate and consistent and reliable." Now, in estimating the average weekly earnings of a man of that character, the learned judge has taken only the average weekly earnings of everybody, good, bad, and indifferent, who may be engaged in casual labour as corn porters about the docks of Bristol. The sum which is arrived at for the purposes of this appeal as the average actual earnings of the man himself does not necessarily conclude the matter. That is arrived at for the purposes of this appeal at 2*l.* It would be wrong for the judge in this case, or in any other case, to adopt a hard and fast rule and to say that a man has actually worked for a twelvemonth and has had the average weekly earnings of so and so. If that is adopted as a hard and fast rule it is wrong; but that is obviously not only a consideration, but a very important consideration, in making a computation as to what the average weekly earnings of a man ought to be estimated to be. It has been left to us to fix the amount, and I agree with the Master of the Rolls that the 50 per cent. which the learned judge intended to give ought to be applied to the sum of 2*l.* a week and not to the sum of 25*s.* a week. On these grounds I think the appeal succeeds.

---

(1) [1913] 2 K. B. 115.
(2) [1908] 1 K. B. 441.
(3) (1908) 1 B. W. C. C. 379, 391.
(4) [1912] 2 K. B. 366.

EVE J. I concur. I express no opinion on the question whether this is a case in which the proviso to paragraph 2 (*a*) of Sched. I. comes into operation or not. It is enough to say that on this occasion the learned judge has omitted to have regard to the element of the personal qualifications of the workman, an element which in my view of the authorities is an essential element in the computation of the average weekly earnings. I, too, think that the figure at which the Master of the Rolls has fixed the compensation is the right, fair, and proper amount.

Appeal allowed.

Solicitors: *Helder, Roberts, Walton & Giles, for Lawrence & Co., Bristol; Robins, Hay, Waters & Hay, for E. J. Taylor, Town Clerk of Bristol.*

G. A. S.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D.
1913
Dec. 10, 11.
C. A.
1914
Jan. 23, 26.

In re WORTHINGTON.

Ex parte PATHÉ FRÈRES.

Bankruptcy—Company Promoter—Underwriting Contract—Omission from Prospectus—Death before Completion of Contract—Proof against Estate—Personal Contract—Validity of Contract—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 62), *s.* 89.

An underwriting contract by which A. agrees to place the share capital of a company is not a contract personal to A. dependent on the continuance of his life, but is a contract which can be fulfilled by his executors, and, if A. dies before completion of the contract and his executors do not complete, damages for breach of contract may be recovered from his estate.

By an agreement dated November 30, 1912, W. agreed with a French company (1.) to form within seven days an English company with a capital of 105,000*l.* divided into 100,000 ordinary shares of 1*l.* and 100,000 participation shares of 1*s.* each, (2.) to place the ordinary share capital in three blocks of shares by certain short dates, (3.) to procure the English company to enter into a contract of purchase with the French company in the terms of an agreed draft, and (4.) that he should be at liberty to receive from the English company 5 per cent. of its ordinary shares fully paid up for forming that company and procuring the contract, and by an agreement dated December 9, 1912, W. agreed with the English company to procure the French company to enter into the contract of purchase in the terms of the agreed draft in consideration of being allotted 5000 fully paid up ordinary shares of the company. By another agreement, also dated December 9, 1912, the French company agreed to sell to the English company certain rights in consideration (inter alia) of being paid in cash 10 per cent. of the ordinary share capital of the English company as and when subscribed, and the agreement was upon the express condition that the

C. A.

1914

WORTHINGTON, *In re.* PATHÉ FRÈRES, *Ex parte.*

ordinary share capital should be subscribed in three blocks of shares by the dates specified in the agreement of November 30, 1912.

On December 10, 1912, the English company was registered with the stipulated capital and with the object of carrying into effect the two agreements of December 9, 1912. Its articles authorized the payment to any person of a commission not exceeding 10 per cent. for procuring subscriptions for its share capital. Its prospectus, issued the same day, offered 50,000 ordinary shares for subscription at par, and stated that no underwriting commission had been or would be paid, and also that part of the purchase consideration was 5000 fully paid up shares to be allotted to W. for forming the company. W. placed the first block of shares and died in February without placing any further shares. A claim by the French company to prove against his estate, which was being administered in bankruptcy, for damages for breach of the agreement of November 30, 1912, was objected to by the trustee on the grounds (1.) that that agreement was a contract personal to W. which determined at his death, and (2.) that the three agreements were one transaction which was in contravention of s. 89 of the Companies (Consolidation) Act, 1908.

Held by Horridge J. and the Court of Appeal, that the agreement of November 30 was not a contract personal to W., but was enforceable against his executors, for the breach of which damages would lie.

Held, also, that the three agreements did not form a scheme which was in contravention of s. 89 of the Companies (Consolidation) Act, 1908; and that, even if there was such a scheme, the commission of 5000 shares payable to W. was sufficiently disclosed in the prospectus.

THIS was an appeal by a French company against the rejection of its proof against the estate of a deceased debtor which was being administered under s. 125 of the Bankruptcy Act, 1883, under these circumstances.

By an agreement dated November 30, 1912, and made between the Compagnie Générale des Établissements Pathé Frères (hereafter called Pathé Frères) of the one part, and B. W. Worthington (hereafter called the debtor) of the other part, after reciting that the debtor had proposed to Pathé Frères to form in England an English company for the exclusive sale in the United Kingdom of the cinematograph machines and films of Pathé Frères, it was agreed:

1. That the debtor should within seven days cause to be registered in England a company under the name of Pathéscope Limited, having for its principal object the exclusive sale in the United Kingdom of the machines and films aforesaid.

2. That Pathéscope Limited should have a capital of 105,000*l.*

divided into 100,000 ordinary shares of 1*l.* each and 100,000 participation shares of 1*s.* each, and that each class of shares should be entitled to half the profits and half the assets in a winding-up and to elect half of the directors.

3. That the debtor should procure to be subscribed 25,000 of the said ordinary shares at par within ten days after the execution of the now stating agreement (in addition to the 5000 fully paid up shares allotted to him under article 5) and a further 25,000 shares at par before March 31, 1913, and the remainder of the capital, that is, 45,000 shares, before December 31, 1913.

4. That in consideration of the obligations undertaken by the debtor by the preceding clauses Pathé Frères undertook that it would, immediately after the registration of the said company, at the request of the debtor enter into a contract therewith in the terms of the draft which had already been prepared and agreed between the parties and was scheduled to the present agreement (being the second agreement of December 9, 1912, after stated).

5. That the debtor should be at liberty to stipulate for the issue to him by the said company, credited as fully paid up, of 5 per cent. of the ordinary shares of the said company in consideration of his forming the said company and arranging the said contract; and that the debtor should also be at liberty to arrange for the persons who found the subscriptions for the first 25,000 of the ordinary shares of the company having the call at par upon a further 25,000 of the said shares until December 31, 1913.

6. That the memorandum and articles of association of the company should be subject to the reasonable approval of Pathé Frères.

By an agreement dated December 9, 1912, and expressed to be made between the debtor of the one part and Pathéscope Limited of the other part, it was agreed:

1. That the debtor should within fourteen days procure Pathé Frères to enter into an agreement with the company in the terms and form of the draft contract therein mentioned and being the agreement next after stated.

2. That in consideration of the services of the debtor in

arranging and procuring the said contract the company should allot to him or his nominees, credited as fully paid up, 5000 ordinary shares, and that he should also be entitled to call upon the directors to allot to him from time to time at par 25,000 ordinary shares of the company, such call to be exercised by notice in writing to the company not later than December 31, 1913, and the shares so allotted to him to be paid up at such times as the directors might fix.

3. That the company should pay the costs of and incidental to the preparation and execution of the now stating agreement and of the memorandum and articles of association of the company and of the registration thereof, and of all stamps, fees, and legal expenses incident to the formation of the company, and generally all preliminary expenses whatever incurred in relation to the company down to the first allotment of shares, and also the legal costs of and incidental to the registration and preparation of the draft contract referred to in clause 1.

By another agreement, also dated December 9, 1912, and expressed to be made between Pathé Frères of the one part and Pathéscope Limited of the other part, after reciting the agreement of November 30, 1912, and the formation of the company, it was (so far as material) agreed as follows:—

Clauses 1 to 5 (both inclusive) provided for the sale and assignment by Pathé Frères to the company of the cinematograph machines and films of Pathé Frères and the patents connected therewith, and for the granting of licences.

6. That for the considerations aforesaid the company would on its formation hand over to Pathé Frères (1.) 100,000 participating shares of 1*s*. each, credited as fully paid up, and (2.) a sum of 10 per cent. of the total amount of the capital which should have been paid up, and this on the very day on which such payment should be made by the shareholders of the company in respect of the shares subscribed by them.

7. That the contract was subject to the express condition that the company should obtain subscription at par of their capital of 100,000*l*. in ordinary shares at the following dates: (1.) 30,000 ordinary shares in the company within ten days following the execution of the now stating contract, whereof 25,000 shares

should be subscribed in cash and 5000, credited as fully paid up, should be handed over to the debtor, (2.) 25,000 ordinary shares within three months following, and (3.) 45,000 ordinary shares, the balance of the capital, before December 31, 1913.

Pathéscope Limited was incorporated on December 10, 1912, under the Companies (Consolidation) Act, 1908, with memorandum and articles of association, and with the object (inter alia) of carrying into effect the two agreements of December 9, 1912. The tenth article of association empowered the company to pay a commission at a rate not exceeding 10 per cent. on any shares to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company.

The prospectus of the company, which was issued to the public on December 10, 1912, stated that the capital of the company was 105,000*l.* divided into 100,000 ordinary shares of 1*l.* each and 100,000 participation shares of 1*s.* each, and offered 50,000 ordinary shares for subscription at par. It then stated that "no underwriting commission has been or will be paid." Then followed the names of the six directors of the company, three of whom were directors of Pathé Frères. The prospectus also stated, under the heading "Purchase Consideration," that Pathé Frères and the debtor were respectively the vendors and promoter of the company, and that the consideration payable by the company to the vendors was "(1.) the issue to them of all the participation shares of the company credited as fully paid up, and (2.) payment of a sum or sums in cash equal to one-tenth of the issued ordinary capital of the company for the time being. For his services in arranging and procuring the contract with the vendors and in organising the company and its business the company will allot to Mr. Worthington 5000 ordinary shares credited as fully paid up and gives him a right until the 31st of December, 1913, to a call at par on 25,000 further ordinary shares of the company. It will be noted that, with the exception of the cash payment of 10 per cent. to the vendors, no cash profit whatever is being made on the flotation of the company." Then followed the dates and names of the parties to the agreement of

November 30, 1912, and the two agreements of December 9, 1912. The prospectus further stated that the directors would not "go to allotment upon less than 25,000 shares, and as these shares have already been applied for the directors will proceed to allotment immediately on the closing of the list."

These 25,000 shares were the first 25,000 ordinary shares mentioned in clause 3 of the agreement of November 30, 1912. The debtor died in February, 1913, without having obtained any further subscribers to the share capital of the company, and in July, 1913, an order was made under s. 125 of the Bankruptcy Act, 1883, for the administration of his estate, and the official receiver was the trustee.

In November, 1913, Pathé Frères lodged a proof against the debtor's estate for 9997*l.* 8*s.* for the loss and damage sustained by them by reason of the failure of the debtor, his executors and administrators, to perform the debtor's obligations under the agreement of November 30, 1912, whereby they had lost the 10 per cent. commission which would have been receivable by them under their agreement of December 9, 1912, on the subscription of the second 25,000 shares in Pathéscope Limited on March 31, 1913, and of the 45,000 shares in the same company on December 31, 1913, whereby the 100,000 participation shares allotted to them had greatly depreciated in value.

The trustee rejected the proof on the grounds (1.) that the contract of November 30, 1912, had been superseded by the contracts of December 9, 1912 (this objection was subsequently abandoned); (2.) that the contract of November 30, 1912, was a personal contract between Pathé Frères and the debtor, and consequently was not enforceable against his estate; and (3.) that the three contracts infringed the provisions of s. 89 of the Companies (Consolidation) Act, 1908. (1) Pathé Frères appealed against this rejection of their proof.

(1) The Companies (Consolidation) Act, 1908, enacts:—

Sect. 89: "(1.) It shall be lawful for a company to pay a commission to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares in the company, or procuring or agreeing to procure subscriptions, whether

1913. Dec. 10, 11. *Clauson, K.C.*, and *Gordon Brown*, for Pathé Frères. It cannot be contended that the agreement of November 30, 1912, was superseded by the two agreements of December 9. It was a separate contract. In the next place, if a contract is personal to a testator, no liability attaches upon his executors or administrators unless a breach occurred in the lifetime of the testator: Williams on Executors, 10th ed., p. 1349. But this is not such a contract. It is not a contract of such a personal nature that it cannot be enforced against his executors. It is not a contract of personal service like *Baxter* v. *Burfield.* (1) There is no personal relation between the parties. It is a business contract which his executors could have fulfilled, although, perhaps, it was a little more difficult for them than for him, and there is no authority for extending the principle of personal contracts to an underwriting contract. Thirdly, this was a contract between Worthington and Pathé Frères which did not come within the prohibition of s. 89. Pathé Frères were not subscribing for any shares, and the three agreements were not a scheme to pay an underwriting commission to Worthington and to evade the provisions of the section.

---

absolute or conditional, for any shares in the company, if the payment of the commission is authorised by the articles, and the commission paid or agreed to be paid does not exceed the amount or rate so authorised, and if the amount or rate per cent. of the commission paid or agreed to be paid is—

"(*a*) In the case of shares offered to the public for subscription, disclosed in the prospectus; or

"(*b*) In the case of shares not offered to the public for subscription, disclosed in the statement in lieu of prospectus . . . .

"(2.) Save as aforesaid, no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission, discount, or allowance, to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company, or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any shares in the company, whether the shares or money be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company, or the money be paid out of the nominal purchase money or contract price, or otherwise."

(3.) saves to a company the power to pay such brokerage as it can legally do.

(1) (1747) 2 Str. 1266.

But if it were such a scheme, it does not affect the liability of Worthington to Pathé Frères, who are a French company and are not subject to the English company law. In the event of this appeal being allowed, it is submitted that the proof should be remitted to the trustees to assess the quantum of damages.

Gore-Browne, K.C., and *A. Stiebel*, for the trustee. We do not argue the first point, and we agree that, if the applicants are successful, it will be for the trustee to assess the quantum of damages in the first instance. But our contention is that Pathé Frères have no right of proof on two grounds. It is submitted, in the first place, that the agreement of November 30 from the nature of the circumstances was a purely personal contract which on Worthington's death could not be enforced against his executors. It was a bargain between a company and a man to form a company and to procure subscribers to the capital of the company. It was a business transaction requiring great personal skill and financial influence, and all parties knew from a business point of view that the contract could only be carried out by Worthington and that its performance became impossible on his death. It comes within the principle laid down in *Taylor* v. *Caldwell* (1) that, if a person binds himself to do something which requires to be performed by him in person, there is an implied condition that if he dies before completion his executors are not liable. Here, the parties contracted on the basis of the continuance of the life of Worthington and contemplated that his executors could not carry out the contract, because they expressly stipulated in clause 7 of the second agreement of December 9 that if the capital was not subscribed within a year they should not be bound; and being a personal contract the trustee was unable to disclaim it. Secondly, this was a transaction which infringed the provision of s. 89 of the Companies (Consolidation) Act, 1908. That section prohibits the application by a company, either directly or indirectly, of any of its shares in payment of any commission unless the commission is authorized by the articles and is disclosed in the prospectus. Here the articles authorize a commission of 10 per cent., but the prospectus says that "no underwriting commission has been or will be paid," and the real transaction is not disclosed. If the agreement of November 30 stood alone, it would be unobjectionable, but it was part of a tripartite arrangement and read with the two agreements of December 9 it was a scheme or device to evade the provisions of the section with the object of paying Worthington, under the cloak of a commission for forming the English company, a commission for underwriting the ordinary share capital of that company. The company was practically in esse at the time, for it was registered the next day, and had to bear all the expenses of its formation, and Worthington, though nominally getting 5000*l.* for forming the company and procuring the contract with Pathé Frères, was in truth and in fact getting that sum for undertaking to place the share capital of the company. That was the real transaction regarded as a whole and, if not truly disclosed in the prospectus, was illegal; and if the consideration for any part of an agreement is illegal, then every promise contained in the agreement becomes illegal also, because in every such case every part of the consideration is consideration for the promise: *Kearney* v. *Whitehaven Colliery Co.* (1); *Gant* v. *Hobbs* (2); *Scott* v. *Brown, Doering, McNab & Co.* (3) The nearest case to the present is *Booth* v. *New Afrikander Gold Mining Co.* (4), in which the payment of a sum of 12,500*l.* in cash was held to be really commission. Moreover, no one of the three agreements could have been worked out without the other two, and Pathé Frères were the promoters of the company and approved the articles, and three of their directors were directors of the company. The inference is that they were parties to the whole transaction, and that the 10 per cent. of the subscribed capital payable to them was really also commission. If so, it absorbed the whole of the commission payable by article 10, and the payment of the 5000 shares to Worthington was illegal.

---

(1) (1863) 3 B. & S. 826, 835.

Clauson, K.C., in reply. An underwriting contract is not illegal. The statute only provides that it must be disclosed, and it is submitted that the 5000*l.* is sufficiently referred to in the prospectus. The onus is on the trustee to prove that the parties had a wicked intention to break the law: *Collins* v. *Blantern* (1); *Waugh* v. *Morris.* (2)

---

(1) [1893] 1 Q. B. 700, 711.

(2) [1912] 1 Ch. 717, 725.

(3) [1892] 2 Q. B. 724.

(4) [1903] 1 Ch. 295.

Horridge J. This is an appeal by a French company, which I will call Pathé Frères, against the rejection by the trustee of their proof of debt in the estate in bankruptcy of the deceased man Worthington. The facts of the case arise out of three agreements. The first agreement is dated November 30, 1912, and is made between Pathé Frères and the deceased man. It recites that Worthington has proposed to Pathé Frères to form in England an English company for the sale in the United Kingdom of their machines and films. [His Lordship read clauses 1 to 3 of the agreement, and continued:] Therefore, what Worthington agrees to do is to procure the subscription of 25,000 ordinary shares within ten days, to procure the subscription of a further 25,000 ordinary shares before March 31, 1913, and to procure a subscription of 45,000 shares before December 31, 1913. The 45,000 shares were the whole of the remaining ordinary share capital, except the 5000 shares which are dealt with as being possibly issued to him. I say "possibly," because under this agreement it is a mere liberty to him to receive the 5000 shares. Then clause 4 of the same agreement provides that Pathé Frères shall enter into an agreement with the proposed English company in the form which is scheduled, and clause 5 gives him liberty to stipulate for the issue to him by the English company of fully-paid shares to the extent of 5 per cent. of the ordinary share capital of the company. The rest of that clause is not material. Then clause 6 provides that the memorandum and articles of association of the English company shall be subject to the reasonable approval of Pathé Frères. Now the clause under which the claim in this case is made is clause 3, because Pathé Frères say "that clause, worked in combination with the clause (to which I will presently refer) in the agreement made by us with the English company, would have given us certain moneys, and by your not obtaining the subscription to those shares as provided by clause 3 you have caused us damage for which we are entitled to prove." The

(1) 1 Sm. L. C., 11th ed. p. 385.

(2) (1873) L. R. 8 Q. B. 202.

next agreement in order of date is that entered into between the English company and Worthington, and is dated December 9, 1912. The reason why I say that it is the next in order of date is because in clause 1 it refers to the third agreement (also of the same date) as one to be obtained. By clause 1 Worthington agrees within fourteen days after the execution of the agreement to which I am now referring that he would procure Pathé Frères to enter into a contract with the English company, the draft of which is identified by signature. Then by clause 2, "in consideration of the services of the said Worthington in arranging and procuring the said contract the company will allot to him or his nominees, credited as fully paid up, 5000 ordinary shares of the company." That is the important part of that agreement. The third agreement is entered into between the two companies, and by that agreement the French company agreed to sell certain rights to the English company, and by clause 2 it is provided that a sum of 10 per cent. of the total amount of the capital which shall have been paid up, and this on the very day on which such payment shall be effected, by the shareholders of the English company in respect of the shares subscribed by them, shall be paid to the French company. That agreement makes no reference to the 5000 shares which were to be allotted to Worthington as fully paid up.

Now the claim of Pathé Frères is put in this way. It is said that under clause 3 of the agreement between Pathé Frères and Worthington, he agrees to get subscribed the various blocks of shares which are mentioned in that clause, and under clause 6 of the agreement made between Pathé Frères and the English company, when those shares were subscribed, Pathé Frères were entitled to be paid 10 per cent. commission upon the subscribed capital, and that owing to Worthington not having completed his contract they have lost that 10 per cent. commission. They also claim damages for the depreciation in value of their participation shares, but it is not necessary for me to go into that matter, because the question of the 10 per cent. commission raises the grounds upon which the trustee rejected their proof, and it has been agreed on both sides that I am not to deal at all with any question of the quantum of damages, but have merely to decide

1913

WORTHINGTON, *In re.* PATHÉ FRÈRES, *Ex parte.*

Horridge J.

whether the rejection of the trustee is justified or not. The trustee rejected the proof upon three grounds. The first ground was that the agreement between Pathé Frères and Worthington had been superseded by the two subsequent agreements. I am not surprised that Mr. Gore-Browne did not argue that point, but he pressed two other points. First he says that the agreement of November 30 was a contract with Worthington of such a nature that it was a condition of the contract that it should only be performed by Worthington personally, and that upon his death there was no longer any obligation upon his executors to perform it. The law as to that is I think stated quite concisely at the end of the judgment of Blackburn J. in the case of *Taylor* v. *Caldwell* (1), which was relied upon by Mr. Gore-Browne. Blackburn J. says this: "The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel." Now I have to ask myself, can the parties here have contracted upon the assumption of the continuation of the existence of Mr. Worthington? It was a contract by which Pathé Frères agreed to give certain rights to an English company to be formed by Mr. Worthington, and he agreed to procure the subscription of the share capital of that company. That is not a contract in any sense of personal service, and I cannot see myself why that contract could not have been equally fulfilled by his getting somebody else to take it over and to get the subscriptions for him. I do not think there is anything which necessarily involves that his personally procuring the subscriptions should be a condition of the contract at all. I think it was a contract to get the shares subscribed, and that his executors could equally have got them subscribed if they could have got people who would have found subscriptions. I do not think it is within the principle at all of the continued existence of the life of the contracting party. But Mr. Gore-Browne put a further point. He said that, by the agreement between Pathé Frères and Worthington, Worthington was at liberty to get 5000 fully-paid shares from the English company, and that the only thing Worthington really contracted to do was to get the share capital subscribed, and then that Pathé Frères make a contract with the English company by which they contract to carry out their agreement with Worthington to enter into the contract with the proposed English company, and that the success of that contract depends upon whether or not Worthington gets the capital subscribed, and that I must look at the transaction as a whole and say that, so far as Worthington was concerned, it was in effect a transaction, to which Pathé Frères were parties, that the English company should pay him a commission of 5000 fully-paid shares in consideration of his getting the capital of the English company subscribed. Now there is nothing wrong in that, even if it was done. I am not satisfied myself, and if it is a question of fact for me to be arrived at by drawing inferences from the documents, I do not think the documents ought all three to be looked upon as a portion of one scheme. I think they were executed as they were intended to be executed, and meant what they say. But assuming they were one scheme, that would be a scheme into which Pathé Frères and the English company and Worthington had entered, and by which Worthington was to get the 5000 shares for obtaining subscriptions to the capital of the English company. That might be perfectly legally done. If one looks at s. 89 of the Companies (Consolidation) Act, which is relied upon as making it illegal, it is quite clear that the legality of it depends upon whether or not the company to be formed authorized by its articles the payment of such commission and the amount of it was stated in the prospectus. Here the memorandum and articles of association had to be shewn to Pathé Frères, and if they were shewn to that company they would find that by article 10 the English company might pay a commission at a rate not exceeding 10 per cent. on shares to any person in consideration of his subscribing or agreeing to subscribe for the shares of the company. Therefore, all that Pathé Frères would know as a company was that by the articles there was authority taken to pay this commission. Why then am I to assume that at the time Pathé Frères entered into this agreement with Worthington they had, to use the language in the notes to *Collins* v. *Blantern* (1), "a wicked intention to break the law"? It is said I ought to assume it because there are three directors of Pathé Frères who are under the agreements made directors of the English company, and that in the prospectus that was issued the following day after the agreements of December 9 their names appear as directors of the English company. That does not seem to me in any way to bring knowledge of the prospectus home to Pathé Frères as a company. But the prospectus does say, under the heading of "Purchase Consideration," that for his services in arranging and procuring the contract with the vendors and in organizing the company and its business the company will allot to Mr. Worthington 5000 ordinary shares, credited as fully paid up. It is quite true that in my opinion that statement is not quite the same as a statement that it is being paid to him for subscribing shares, as is required under s. 89 of the Companies (Consolidation) Act, 1908. But it is telling everybody that he is getting 5000 shares for what he has done; and I do not think, even if the prospectus is brought home to Pathé Frères,—which as I have said I do not think it is—that the nature of the prospectus is such as to force or induce me to draw the conclusion that, at the time the first agreement was entered into, Pathé Frères had a wicked mind to break the law in entering into it. If that is so, then in any view of the facts the agreement entered into with Worthington is one which contained a stipulation that could be legally performed, and I see no reason to say that the parties entered into it with a wicked mind to do what they did in an illegal way. I therefore hold that the agreement is enforceable. But Mr. Gore-Browne made another point which he put in two ways. He said that the agreement between the two companies contained a clause that 10 per cent. of the subscribed capital should be paid as commission to Pathé Frères. In my view that was fixing the amount of purchase-money and had nothing to do with commission for the subscription of shares, and none the less so because the agreement also contained a clause that it was entered into subject to the express condition that the English company should obtain subscriptions at par of their capital of 100,000*l.* It seems to me those two clauses are merely provisions for purchase-money, and the vendors, in order to protect themselves against having share capital without any cash capital to deal with, say unless the capital is subscribed the agreement need not go through. Mr. Gore-Browne put that in another way. He said, if it is an agreement to pay commission, then the commission agreed to be paid by the company would exceed the limit allowed them by article 10, because there was also the commission of 5000*l.* to be paid to Worthington. I have said I do not think it is a commission at all, and therefore I do not think that argument prevails. For these reasons I think the rejection of the proof by the trustee must be reversed, and the applicants must have the costs of the motion. But I think that the proof should be referred back to the trustee with liberty for him to consider whether, if so advised, he will disclaim the agreement of November 30, 1912, as an onerous contract.

---

(1) 3 B. & S. 826, 839.

---

(1) 1 Sm. L. C., 11th ed., p. 385.

H. L. F.

The trustee appealed.

1914. Jan. 23. *Gore-Browne, K.C.*, and *A. Stiebel*, for the appellant, made use of the same arguments as in the Court below and also cited *Armstrong* v. *Armstrong* (1) and *Griffith* v. *Tower Publishing Co.* (2)

Clauson, K.C., and *Gordon Brown*, for the respondents.

COZENS-HARDY M.R. I will ask the President to give the leading judgment.

SIR S. EVANS, PRESIDENT. This is an appeal from a judgment of Horridge J. which raises the question whether or not a French company, called Pathé Frères for short, were entitled to

(1) (1834) 3 My. & K. 45, 64.

(2) [1897] 1 Ch. 21.

C. A.
1914

WORTHINGTON,
In re.
PATHÉ FRÈRES,
Ex parte.

The President.

bring in a proof in the bankruptcy of a man named Worthington. The proof was rejected, and an appeal was had before Horridge J., in which he held that the agreement between Worthington and Pathé Frères was valid, and, therefore, their proof ought to be admitted for whatever amount they could establish for their claim. The question here is whether or not the judgment of Horridge J. is right.

The first point argued by Mr. Gore-Browne, appearing for the trustee, was that no claim could be made under the contract between the French company and Worthington by reason of its being a contract for personal services, and that inasmuch as Worthington was dead the contract had come to an end.

Now the contract between Worthington and the French company is contained in a document which has been put in, dated November 30, 1912. Putting it shortly, the French company were the owners of certain cinematograph films which it was suggested should be put upon the market in this country; and Mr. Worthington, as the agreement states, proposed to the French company to form here an English company for that purpose. The following were the main provisions of the agreement between the French company and Worthington: "(1.) The said Berners Whiteside Worthington shall within seven days after the date of this agreement cause to be registered in England a company under the name of Pathéscope Limited having as its principal object the exploitation in the United Kingdom of the domestic and educational cinematograph machines and the films for the same with special patented perforation and the cameras for taking pictures for the same. (2.) The Company Pathéscope Limited shall have a capital of 105,000*l.* divided into 100,000 ordinary shares of 1*l.* and 100,000 participation shares of one shilling each and each class of shares shall be entitled to half the profits and half the assets in a winding-up and to elect half the directors. (3.) The said Berners Whiteside Worthington shall procure 25,000 of the said ordinary shares to be subscribed for at par within ten days after the execution of this agreement in addition to the 5000 fully paid up shares allotted to him under article 5 and a further 25,000 shares to be subscribed for at par before the 31st day of March 1913

C. A.
1914

WORTHINGTON, *In re.*
PATHÉ FRÈRES, *Ex parte.*

The President.

and the remainder of the capital that is 45,000 shares on or before December 31st 1913." The claim was put forward in respect of the alleged agreement in that clause. I do not think I need trouble about clause 4. Then clause 5 of the agreement says this: "The said Berners Whiteside Worthington shall be at liberty to stipulate for the issue to him by the said company Pathéscope Limited credited as fully paid 5 per cent. of the ordinary shares of the company in consideration of his organising the company and arranging the said contract." Now in our opinion it is perfectly clear that the contract contained in this agreement for procuring the subscription of the various shares which are referred to in paragraph 5 of the agreement was not a contract for personal services in the sense contended for. Therefore, the contract did not come to an end on the death of Worthington, and the first point made by Mr. Gore-Browne fails.

His second point is that the whole agreement was illegal because the French company in some way had arranged that Worthington should be paid certain promotion money, to put it shortly, and that that was done in an illegal way when the English company was formed. In the first place, at the date of the first agreement there was nothing at all illegal in any provision of that agreement. The only provision affecting this head of the case is contained in clause 5, which says that Worthington should be "at liberty to stipulate for the issue to him by the said company Pathéscope Limited credited as fully paid 5 per cent. of the ordinary shares of the company in consideration of his organising the company and arranging the said contract." It is said that the documents in this case shew that there was an intention on the part of the French company to carry out what at that time was a perfectly legal contract in some illegal way. Now there is no evidence in this case at all apart from the three agreements which are put in, and the prospectus which was issued by the English company, and we are asked to infer some intention on the part of the French company on November 30 to carry out the agreement made with Worthington in some illegal way. The matter proceeded in due course, and on December 9 an agreement was made by Worthington with the English company, and upon the same date, or the day afterwards, or immediately after the English company was formed, a further agreement was entered into between the French company and the English company. It is said that by reason of s. 89 of the Companies (Consolidation) Act, 1908, and by reason of misstatements, or non-statements, in the prospectus, the agreement between Worthington and the English company that he was to have 5000 fully paid up shares for services rendered was an illegal agreement. We have nothing to do with that matter in our view of what the decision of the Court ought to be. The illegality of that transaction has not up to now been suggested by anybody who could challenge it, and we need not, and do not, express any opinion upon that subject. But assuming for the purpose of this case that there was some illegality or informality under the provisions of s. 89 of the Act—and only for such purpose—as to that agreement or its disclosure, nevertheless, the appellant here has failed to establish that there was any part taken by the French company in the arrangement made by the English company and Worthington as to the form in which the shares were to be allotted to him or as to how the transaction should be disclosed or described in the English prospectus. We are asked to infer an intention upon their part that some illegality should be committed. We see no ground whatever for such an inference. The English company at that time had not been formed, nor had its prospectus been issued. It is doubtful, to say the least of it, whether there was any illegality in the transaction. Under those circumstances it is quite clear to us that the contract which was made on November 30, and the claim of the French company founded on it, to put in a proof in the bankruptcy of Worthington, are not tainted with any illegality whatsoever.

I think upon those grounds that the judgment of Horridge J. was right; and that the proof of the French company must be admitted.

The appeal must, therefore, be dismissed with costs.

Eve J. I agree. I think this appeal fails. Without saying that there may not be cases in which a contract for promotion may be one for personal service, there is in this case nothing in the documents themselves, nor is there any evidence, to support the contention that the contract of November 30 was in fact a contract for personal service.

On the second point, assuming in favour of the appellant that all the three agreements must be looked at as one tripartite agreement, they only amount to this, that the French company, who were interested to the extent of a moiety of the capital and profits in the English company, thereby assent to an arrangement being come to between the English company and the promoter, whereby the English company is to remunerate the promoter for his agreement to procure capital. On the face of it that is a legal arrangement, and an arrangement sanctioned by the statute, and the mere fact that the promoter in settling the constitution of the English company omitted so to frame it as to enable that agreement to be carried out in legal form cannot operate to defeat the right of the French company to insist on the discharge by him of the obligations which he undertook towards them.

For those reasons I think the second ground fails.

COZENS-HARDY M.R. The appeal will be dismissed with costs.

Appeal dismissed.

Solicitors: *Waterhouse & Co.; Bristows, Cooke & Carpmael.*

H. C. R.

1914
Feb. 9, 11, 14.

LUCY *v.* BAWDEN.

[1913 L. 1583.]

Negligence—Dangerous Premises—House let out in Separate Floors—Flight of Steps in Possession of Landlord—Steps insufficiently fenced—Liability of Landlord to Wife of Tenant—Knowledge on Part of Tenant's Wife of insufficient fencing of Steps.

The defendant was the owner of a house which consisted of a basement and two upper floors, the rooms on each floor being separately let. The house was entered by a front door on the ground floor level which was approached from the street by a flight of six or seven steps, these steps being protected on each side by a coping about eight inches high. On either side of the steps was an area. The steps remained in the defendant's possession and control. The plaintiff, the wife of one of the tenants occupying the house, slipped on the steps and fell into the area, sustaining considerable injuries. In an action by the plaintiff against the defendant claiming damages in respect of those injuries, the jury found that the defect in the steps in consequence of which the accident occurred consisted not in any disrepair of the steps themselves, but in the absence of a railing; that this defect was due to the negligence of the defendant; and that both the plaintiff and the defendant knew before the accident of the existence of the defect:—

Held, that the only obligation upon the defendant in reference to the approach to the house was to avoid exposing the plaintiff to any unexpected danger without giving her warning; that as the danger was patent to every one, and the plaintiff in fact knew of it, she had voluntarily taken upon herself to bear the risk; and, therefore, that she had established no cause of action.

Miller v. *Hancock* [1893] 2 Q. B. 177 considered and distinguished.

Huggett v. *Miers* [1908] 2 K. B. 278 followed.

Action tried by Atkin J. with a jury.

The following statement of facts is substantially taken from the judgment.

The plaintiff, a married woman, residing with her husband in two rooms on the ground floor of a tenement house, No. 1, Edward Square, Islington, of which two rooms her husband was the tenant, sued the defendant, her husband's landlord, the owner of the premises, for damages for negligence in respect of the condition of the steps which led up to the front door of the house. The house consisted of a basement and two upper floors; the rooms on each floor were separately let; the house was entered

1914

LUCY
v.
BAWDEN.

by a front door on the ground floor level which was approached from the street by a flight of six or seven steps; the steps were only protected by a coping on each side about eight inches high, and on either side of the steps was an area; on the left-hand side the area of No. 1, on the right-hand side the area of No. 2. The steps thus formed a bridge across the area, protected only by the coping above mentioned. The landlord had not let this outside stair, and his agent admitted that he considered himself responsible for defects in its repair and had instructed his collector to give him notice of any such defects.

The negligence complained of by the plaintiff was that the second step of the steps mentioned was out of repair and that the steps were insufficiently fenced. She said that she tripped by reason of the defect in the second step and, in consequence of the unprotected state of the steps, fell into the area of No. 2, and suffered considerable injury. At the close of the plaintiff's case defendant's counsel submitted that there was no case to answer, but the judge thought it advisable to have the facts ascertained, and the case continued. Certain questions were left to the jury, and it was agreed by the parties that on any points not covered by such questions the Court was to be at liberty to draw inferences of fact.

The questions left to the jury with the answers were as follows: (1.) Was the plaintiff injured through any defect in the flight of steps? (Answer) Yes. (2.) If so, did the defect consist in the condition of the particular step complained of, or in the absence of a railing at the side? (Answer) In the absence of a railing. (3.) If the injury was caused by such defect, was it due to any negligence on the part of the landlord, the defendant? (Answer) Yes. (4.) Did the plaintiff know before the accident of the existence of the defect, if any? (Answer) Yes. (5.) Did the defendant or his agent know before the accident of the existence of the defect, if any? (Answer) Yes. (6.) If these questions are answered in favour of the plaintiff, what are the damages? (Answer) 22*l.*

Greer, K.C., and *Arthur May*, for the plaintiff. The plaintiff is entitled to judgment on the findings of the jury. There was a duty on the part of the defendant to keep the flight of steps which constituted the approach to the house reasonably safe. The case is indistinguishable from *Miller* v. *Hancock* (1), and the defendant is liable on the principle there enunciated by Bowen L.J., namely, that he had a duty to keep the steps safe for all who might use them. See also to the same effect, *Heaven* v. *Pender* (2), *Smith* v. *London and St. Katharine Docks Co.* (3), and *Hargroves, Aronson & Co.* v. *Hartopp.* (4) The decision in *Miller* v. *Hancock* (1) is not qualified by *Cavalier* v. *Pope.* (5) As to the plaintiff's knowledge of the danger, the maxim volenti non fit injuria does not apply, inasmuch as it is not shewn that she appreciated the risk involved in using the steps.

Haldinstein, K.C., and *Bromley Eames*, for the defendant. The present case is completely covered by the decision of Ridley J. in *Dobson* v. *Horsley* (6), where it was held that there was no liability on the landlord, such as is now contended for by the plaintiff. *Miller* v. *Hancock* (1) has been qualified by the observations of Lord Atkinson in *Cavalier* v. *Pope.* (7) Further, *Miller* v. *Hancock* (1) was a case of lack of repair, and there is no liability on the landlord unless the defect is a lack of repair not known to or suspected by the plaintiff; in other words, the landlord is only liable if the defect constitutes a trap: see per Collins M.R. in *Cavalier* v. *Pope* (8), and per Lord Atkinson in *Cavalier* v. *Pope* (9), where he said "If [the injured person] knows of the danger and runs the risk he has no cause of action." That is the principle laid down in *Indermaur* v. *Dames.* (10) In *Huggett* v. *Miers* (11) it was said by Sir Gorell Barnes in giving judgment that the decision in *Miller* v. *Hancock* (1) "must be regarded as confined to the particular facts which there existed." A landlord can let a house in any condition he pleases and is under no duty to his tenant to see that it is in good condition or reasonably safe—*Lane* v. *Cox* (12);

---

(1) [1893] 2 Q. B. 177.
(2) (1883) 11 Q. B. D. 503.
(3) (1868) L. R. 3 C. P. 326.
(4) [1905] 1 K. B. 472.
(5) [1906] A. C. 428.
(6) (1913) 30 Times L. R. 148.
(7) [1906] A. C. at p. 433.
(8) [1905] 2 K. B. 757, at p. 763.
(9) [1906] A. C. at p. 432.
(10) (1866) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311.
(11) [1908] 2 K. B. 278, at p. 283.
(12) [1897] 1 Q. B. 415.

1914

LUCY
v.
BAWDEN.

Cameron v. *Young* (1)—and the landlord's duty is no higher with regard to an approach to a house used in common by the tenants of the different floors. *Hargroves, Aronson & Co.* v. *Hartopp* (2) is not in point. That case had relation to the escape of water.

Greer, K.C., replied.

Cur. adv. vult.

Feb. 14. ATKIN J. read his judgment, which, after stating the facts set out above, and the answers of the jury, continued as follows: Upon these answers both counsel claimed judgment, and I have taken time to consider what judgment should be entered. Mr. Greer for the plaintiff contended that there was an obligation upon the defendant to provide a reasonably safe staircase for the use of the tenants and such persons as might lawfully use the stairs, relying upon *Miller* v. *Hancock.* (3) Mr. Haldinstein denied that the defendant owed any duty to the plaintiff at all, or that, if he did, it extended beyond an obligation not to expose the plaintiff to any unexpected danger without giving her warning. I think the case of *Miller* v. *Hancock* (3) is an authority binding me to hold that if the landlord remains in possession and control of a common staircase under the circumstances of this case he is under some obligation to persons lawfully using the same. In this case the landlord had not let the outside stairs, his predecessor in title had in fact repaired them, and the landlord's agent admitted that he considered himself responsible for defects in their repair and had instructed his collector to give him notice of any such defects. In respect of possession and control I cannot distinguish this case from *Miller* v. *Hancock.* (3) I was pressed by Mr. Haldinstein with the words of Lord Atkinson in his speech in the House of Lords in *Cavalier* v. *Pope* (4): "In *Miller* v. *Hancock* (3) and *Hargroves, Aronson & Co.* v. *Hartopp* (2) the landlord was held liable because control was retained by him; but the power of control necessary to raise the duty, for a breach of which damages were recovered in the several cases to which we have been referred, implies something more than the right or liability to repair the premises. It implies the power and the right to admit people to the premises and to exclude people from them. But this power and this right belong to the tenant, not to the landlord, and the latter's contract to repair cannot transfer them to him. The existence of such an agreement may entitle a landlord to demand from his tenant admission to the premises for the servants and workmen required to carry out his contract, but nothing in the shape of control"; and it was said that in this case the landlord having let all the rooms had not the power or the right to admit people to the premises or exclude people from them. *Cavalier* v. *Pope* (1) was a case of alleged defect in the premises actually let by the landlord, and the words of Lord Atkinson must be read in reference to the subject-matter of the decision. I do not think that they were intended as an absolute test of control essential to raise the implied duty of the landlord. I am not satisfied in fact that the landlord had the power or the right to admit to or exclude all people from these premises. I should suppose that such right did not exist, at any rate in respect of the families of the tenants, including, therefore, the plaintiff. But, nevertheless, I consider that the circumstances do raise an implied duty on the part of the landlord towards persons using the steps.

---

(1) [1908] A. C. 176.
(2) [1905] 1 K. B. 472.
(3) [1893] 2 Q. B. 177.
(4) [1906] A. C. at p. 433.

The important question is, what is the extent of such duty? I do not see how the duty can be larger than the duty of an occupier of premises to those whom he invites to enter his premises for purposes of lawful business. This obligation was expressed in *Indermaur* v. *Dames* per Willes J. (2): "And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know." Those words are adopted in the judgment of the Exchequer Chamber. (3) In *Smith* v. *London and St. Katharine Docks Co.* (4), where the defendants were sued for providing a gangway from dock to ships insufficiently secured whereby the plaintiff, who had business on the ship,

(1) [1906] A. C. 428.
(2) L. R. 1 C. P. at p. 288.
(3) L. R. 2 C. P. at p. 313.
(4) L. R. 3 C. P. 326.

was damaged, Bovill C.J., said (1): "The case then comes within the principle that persons inviting others on to their premises are answerable for anything in the nature of a trap." Then Byles J. said (1): "There was a duty, on the part of the defendants to the plaintiff, not to permit the gangway to be insecure without warning the plaintiff of it."

It was urged, however, that in *Miller* v. *Hancock* (2) the Court of Appeal had laid down the duty of the landlord as being an absolute duty to provide approaches reasonably safe and to keep them so, and passages were read from the judgments of Lord Esher and Bowen L.J. which, read apart from the context, I think are capable of that construction. For instance Lord Esher says (3): "Under those circumstances, I think that there is a relation between the landlord and those who resort to the premises for business purposes, from which a duty arises on the part of the landlord to keep the staircase, which is the means of access to the premises, in reasonably safe repair." Bowen L.J. says (4): "It appears to me obvious, when one considers what a flat of this kind is, and the only way in which it can be enjoyed, that the parties to the demise of it must have intended by necessary implication, as a basis without which the whole transaction would be futile, that the landlord should maintain the staircase, which is essential to the enjoyment of the premises demised, and should keep it reasonably safe for the use of the tenants, and also of those persons who would necessarily go up and down the stairs in the ordinary course of business with the tenants; because, of course, a landlord must know when he lets a flat that tradesmen and other persons having business with the tenant must have access to it. It seems to me that it would render the whole transaction inefficacious and absurd if an implied undertaking were not assumed on the part of the landlord to maintain the staircase so far as might be necessary for the reasonable enjoyment of the demised premises. . . . . The landlord has given the tenant a right to use the staircase, and undertaken to keep it in repair; and he knows that persons who have business with the tenant will be coming up and down the stairs, and those persons will use the stairs on the understanding that they may lawfully do so, and that in doing so they will be shielded by the responsibility of the person on whom the liability to repair the staircase may rest. That being so, the case appears to me to be brought within the principle upon which *Smith* v. *London and St. Katharine Docks Co.* (1) was decided. In my opinion it is clear, both on principle and authority, that a duty was imposed by law upon the defendant towards persons using the staircase in the course of business with the tenants to keep it reasonably safe." The evidence in that case, however, was clearly consistent with the defect being in the nature of a trap, and the reference in Bowen L.J.'s judgment to *Smith* v. *London and St. Katharine Docks Co.* (1) makes it to my mind very improbable that he intended to state any proposition of law different to what is stated in that case as mentioned above. That this is the true view of the effect of *Miller* v. *Hancock* (2) seems to be established by the judgments of the Court of Appeal in *Huggett* v. *Miers.* (3) The President, Sir Gorell Barnes, there says (4): "Then does the decision in *Miller* v. *Hancock* (2) afford any ground for an implication that in this case the landlord undertook any duty towards the tenants or anybody else to light the staircase? I cannot see that it does. I think that the decision in that case must be regarded as confined to the particular facts which there existed. All the judges in giving their judgments refer to the special circumstances of the case. It was held that under those circumstances there was a necessary implication that the defendant had agreed with the tenants to keep the staircase in repair, and, as the defendant must have known and contemplated that it would be used by persons having business with the tenants, there was an obligation on the defendant to keep it reasonably safe for the use of the tenants and those persons. The words 'reasonably safe,' as there used, meant, I think, 'reasonably safe as regards the repair and condition of the material structure.'" And Fletcher Moulton L.J. says (5): "It was suggested by the plaintiff's junior counsel that, whatever the arrangement as to lighting between the landlord and the tenants may be, the landlord is in such a case under an obligation towards persons using the staircase as a means of access to the tenants' offices to keep it reasonably safe, and for that purpose to light it when it is dark—apparently all night, if necessary. I cannot see how such a duty can be supposed to arise. Take, for example, the case of a house which is let at the end of a private lane. Would it be the duty of the landlord towards persons seeking access to the premises to keep the lane lighted all night? I know of no authority at common law for a duty on the part of a landlord to provide artificial light in such a case. There is a very broad distinction between a case like the present and a case of non-repair of a staircase. If a staircase is dark, a person using it must obviously be aware that it is in that condition; whereas in the case of a person using a staircase which is out of repair, as in *Miller* v. *Hancock* (1), it may not be obvious to him that it is so."

---

(1) L. R. 3 C. P. at p. 333.

(2) [1893] 2 Q. B. 177.

(3) Ibid. at p. 179.

(4) Ibid. at p. 181.

---

(1) L. R. 3 C. P. 326.

(2) [1893] 2 Q. B. 177.

(3) [1908] 2 K. B. 278.

(4) Ibid. at p. 283.

(5) Ibid. at p. 285.

On principle it is difficult to see how an obligation could be imposed upon a landlord larger than the obligation to avoid traps. It is plain that he is, in the absence of express or implied agreement, not liable at all for the consequence of letting a house in a state of even dangerous disrepair. If he lets a loft approached by a ladder, a cellar approached by steep steps, or invites access to his premises over a plank, there seems no reason why the person accepting an invitation to use the ladder, the steps, or the plank, should, if injured by no hidden danger, be at liberty to complain that the access was not of a different and safer character. I can see no difference between the use of an unlighted staircase—*Huggett* v. *Miers* (2)—and the use of an unfenced staircase.

The finding of the jury that the defect was due to the negligence of the defendant must be taken to assume that the duty of the landlord was to provide a reasonably safe access, and not merely to avoid having an access in the nature of a trap. If the duty were the larger one I think there is evidence to support the jury's finding. In my opinion, however, the duty being what I have stated, there was no evidence of negligence on the landlord's part. I can adopt the words of Lord Atkinson in *Cavalier* v. *Pope* (1): "It is, I think, clear that the case does not come within the principle of *Indermaur* v. *Dames* (2) and the cases which followed it down to *Earl* v. *Lubbock* (3), because one of the essential facts necessary to bring a case within that principle is that the injured person must not have had knowledge or notice of the existence of the danger through which he has suffered." In the present case the fourth finding of the jury negatives the existence of the essential fact. The danger, if any, was patent to every one, and the plaintiff gave evidence that she herself had complained to the defendant's agent about it. Mr. Greer contended before me that the plaintiff could recover unless the defendant could shew that with full appreciation of the danger she voluntarily took upon herself to bear the risk. It appears to me that this contention is ill-founded when once the duty of the owner is found to be limited in the sense that I have stated. In such a case the true maxim seems to be scienti non fit injuria. The case might have had a different result had not the jury negatived the existence of a defect in the repair of the steps. As it is, I think that the plaintiff established no cause of action against the defendant, and I direct judgment to be entered for the defendant.

---

(1) [1893] 2 Q. B. 177.

(2) [1908] 2 K. B. 278.

Judgment for defendant.

Solicitors for plaintiff: *W. Gipps Kent & Son.*
Solicitors for defendant: *George W. Cook & Co.*

---

(1) [1906] A. C. at p. 432.

(2) L. R. 1 C. P. 274; L. R. 2 C. P. 311.

(3) [1905] 1 K. B. 253.

J. S. H.

[IN THE COURT OF APPEAL.]

C. A.
1914
Feb. 3.

ALLEN *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Undeveloped Land Duty—Person chargeable—Owner for the Time being—Purchaser in Possession before Execution of Conveyance— Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 19, 33, 41.

By s. 19 of the Finance (1909-10) Act, 1910, "undeveloped land duty shall be assessed" by the Commissioners of Inland Revenue "and shall be recoverable from the owner of the land for the time being." By s. 41 "the expression 'owner' means the person entitled in possession to the rents and profits of the land in virtue of any estate of freehold."

A., whose business was that of a land developer, bought some land and cut it up into plots, which were purchased by different persons under agreements which provided for the payment of the purchase price by instalments and for the execution of conveyances on the completion of the payments. The Commissioners made an assessment upon A. for undeveloped land duty in respect of these plots of land. At the date of the assessment the purchasers were in possession of their respective plots, but not having completed their payments had not received their conveyances. A. appealed to a referee against the assessment on the ground that he was not the owner of the plots of land and was, therefore, not liable to pay the duty. The referee by his award declared that A. was the owner and was liable. From this decision A. appealed to the High Court:—

Held by the Court of Appeal, affirming the decision of Scrutton J., [1914] 1 K. B. 327, that the purchasers, and not A., were the owners of the plots of land within s. 41 of the Act, and that the assessment had, therefore, been wrongly made upon A.

APPEAL from a decision of Scrutton J. (1)

On March 26, 1912, the Commissioners of Inland Revenue served Allen with notices that by virtue of the power and authority vested in them by the Finance (1909-10) Act, 1910, they had for each of the years ending March 31, 1910, 1911, and 1912, made an assessment on him of 15*s*. 7*d*. for undeveloped land duty in respect of certain plots of land in the county of Bedford. The notices further stated that the duty should be paid to the Accountant-General of Inland Revenue, and that if Allen desired to appeal he should give notice as therein specified. In the book of the Commissioners the name of the appellant,

---

(1) [1914] 1 K. B. 327.

"J. Allen," had been entered as the "owner chargeable" in respect of the land in question.

Allen gave notice of his intention to appeal against the assessment on the ground that he was not the person liable for payment of the duty under the provisions of the Act of 1910.

Before the hearing of the appeal amended particulars were served stating the grounds of appeal to be (inter alia) that the appellant was not the person liable for the payment of the duty under the Act of 1910, and that the land in question was not undeveloped land within the true intent and meaning of s. 16, sub-s. 2, of the Act.

At the hearing of the appeal before the referee the following facts were proved or admitted. The business of the appellant was that of a land developer. His method of business was to buy a suitable piece of land for development, to cut it up into plots and advertise the plots for sale by circulars and advertisements. In the ordinary course of his business the appellant had bought land in Bedfordshire and had divided it into plots, certain of which plots were the lands in respect of which the assessments appealed against had been made. These plots had been sold by the appellant to different purchasers on the terms of agreements which provided that a deposit should be paid on signing the agreement, and that the remainder of the purchase-money should be paid by monthly instalments with interest at 5 per cent. from the date of the agreement and payable annually, until the whole of the purchase-money had been paid, "and upon the whole of the purchase-money being paid with interest as aforesaid, the vendor shall execute a conveyance to the purchaser, free of expense, in the form used by the vendor on the sale of other portions of this estate . . . . If default shall be made by the purchaser in any one of the said monthly payments the vendor shall be at liberty at any time (by notice in writing to the purchaser . . . .) to annul the sale and all payments and interest shall thereupon be forfeited to the vendors."

On the signing of the agreements the purchasers of the plots in question had with the consent of the appellant taken possession of their respective plots, and were still in possession at the dates when the assessments had been made, but as they had not completed the payments of their purchase-money, no conveyances of the plots in question to the respective purchasers had been executed.

The referee by his award found and declared that "the owner of the land for the time being" liable to undeveloped land duty in respect of the plots of land was Allen.

From this decision Allen appealed, and Scrutton J. held that he had a right to appeal from the referee's decision to the High Court, and, also, that the purchasers and not Allen were at the date of the assessments the owners of the plots of land within ss. 19 and 41 of the Act, and that the assessments had, therefore, been wrongly made upon Allen. (1)

The Commissioners of Inland Revenue appealed on the question whether Allen or the purchasers were the "owners" of the property.

Sir S. O. Buckmaster, S.-G., Sheldon, and *W. Finlay,* for the appellants. The only question on which there is an appeal is whether Allen is the owner of the plots of land in respect of which the assessments have been made. By s. 41 of the Finance (1909-10) Act, 1910, "The expression 'owner' means the person entitled in possession to the rents and profits of the land in virtue of any estate of freehold" . . . . and it is submitted that Allen is the owner within that definition. It was suggested that he was using this land for business purposes within s. 16, sub-s. 2, but that point is no longer relied on; nor is the contention that these were small holdings within s. 18. By s. 19 undeveloped land duty is recoverable "from the owner of the land for the time being"; by s. 16 it is a duty on site value; and site value is ascertained under ss. 26 and 27. The question therefore is whether Allen is the "owner of the land for the time being" within s. 19 as defined by s. 41. The duty is not made a charge on the land and cannot be recovered by proceedings in Chancery. It is submitted that the word "owner" means the legal owner, not the equitable owner. Allen is the owner of the legal estate in possession, the word "possession" in s. 41 being used in contradistinction to reversion and not in the sense of occupation. The fact that he has let some one else into occupation is immaterial. Allen is the person entitled at law to receive, though not necessarily to enjoy, the rents and profits, and he alone can give a receipt for them, though, when received, he would no doubt hold them as trustee for the purchasers. The expression "entitled to rents and profits" is a definition of the estate; it does not refer to actual rents for grazing and so on. The definition refers to all estates, not to building estates alone, divided into small plots. Allen could restrain the purchasers from committing waste. It is doubtful whether the purchasers could sub-let before they had received their conveyances, and it is certain that they could not sue for the rent. The provision in ss. 18 and 41 that a person who holds land under a fifty years lease shall be owner does not shew that the beneficial owner is intended.

---

(1) [1914] 1 K. B. 327.

[COZENS-HARDY M.R. Under s. 18 of the Conveyancing Act, 1881, a mortgagor in possession can make leases.]

But the mortgagee can go into possession and enforce the covenants in the lease: *Municipal Permanent Investment Building Society* v. *Smith* (1); Carson's Real Property Statutes, 2nd ed., p. 581. Except under the statute the mortgagee could not sue for rent. The present question is whether under s. 41 of the Act of 1910 the owner means the legal or the equitable owner. The vendor was a trustee for the purchaser: *Shaw* v. *Foster* (2); and in s. 41 "owner" means "owner of the legal estate." Where land is held by trustees the persons liable to pay duty are not the beneficiaries but the trustees. Here the vendor has control of the estate although the purchaser is in possession and has paid all the instalments of the purchase-money which have become due. The purchaser is in the position of tenant at will—*Doe* d. *Gray* v. *Stanion* (3)—and leases made by him would be valueless. He could not destroy the estate on which the vendor had a lien for the purchase-money.

[COZENS-HARDY M.R. referred to *Turner* v. *Walsh.* (4)]

A mortgagor in possession might be an "owner" because

(1) (1888) 22 Q. B. D. 70.
(2) (1872) L. R. 5 H. L. 321, 338.
(3) (1836) 1 M. & W. 695.
(4) [1909] 2 K. B. 484, 494.

he would be legally entitled to receive the rents. Here the relationship is that of vendor and purchaser, not mortgagor and mortgagee.

[SIR S. EVANS P. referred to *Fairclough* v. *Marshall* (1) and *Walsh* v. *Lonsdale*. (2)]

This agreement is based on the relationship of trustee and cestui que trust. The vendor has to pay the duty as owner but he gets an indemnity from the purchaser. It would be very inconvenient if tax collectors had to go to all the beneficiaries to collect the duty.

E. P. Hewitt, K.C., and *W. Allen*, for the vendor. It is for the Commissioners to shew that Allen is the "owner," and he is not called upon to shew that anybody else is owner. [They were stopped on the question of convenience.] The purchaser was entitled to remain in possession so long as he performed the terms of the contract. He was not merely a tenant at will. He paid interest on the purchase-money from the date of the contract; and the fact that he paid interest shews that he was the person entitled to the rents and profits within s. 41: *Brooke* v. *Champernowne*. (3) Therefore the vendor was not the person entitled to them and is not the "owner." This is a question of construction of the agreement between the vendor and the purchaser. It is an implied term of the bargain that the purchaser should be entitled to the rents and profits. He is not in the position of a mortgagor; for he cannot be turned out so long as he performs the agreement. The vendor only retains his legal estate as security for payment of the purchase-money: Cyprian Williams on Vendor and Purchaser, 2nd ed., vol. i., p. 524: *Plews* v. *Samuel*. (4) There are other provisions in the Finance (1909-10) Act, 1910, which shew that the word "owner" does not bear the meaning "owner of the legal estate" contended for by the appellants, e.g., ss. 8, 18. A mortgagor in possession is the person liable to pay duty. A mortgagee out of possession and a bare trustee are not liable to pay. By s. 19 any attempt to get rid of the liability by contract is forbidden. The vendor is no doubt a constructive trustee for the purchaser from the moment the contract is entered into: *Shaw* v. *Foster* (1); *Lysaght* v. *Edwards* (2); but that does not affect the definition in s. 41.

---

(1) (1878) 4 Ex. D. 37.

(2) (1882) 21 Ch. D. 9.

(3) (1837) 4 Cl. & F. 589, 611.

(4) [1904] 1 Ch. 464.

Sir S. O. Buckmaster, S.-G., replied.

Cozens-Hardy M.R. This is an appeal from a decision of Scrutton J., who has decided a point which no doubt is of importance under the Finance Act, and I think we ought to be very careful not to decide more than is necessary for the purpose of the present appeal. I do not propose to express any opinion upon some of the points which have been raised, and as to which interlocutory observations have been made by or one more members of the Bench. I propose to confine myself to the facts of the present case.

Mr. Allen entered into a contract for sale to a purchaser upon terms of the purchase-money, with interest, being payable by instalments extending over several years. The purchaser was and is lawfully in possession by virtue of the contract of sale. The full purchase-money has not been paid, but there is no instalment in arrear. The vendor gets interest on his purchase-money, but he cannot, to use the phrase of Knight Bruce L.J., when he was Vice-Chancellor, have both the mud and the money. He cannot have the interest on the purchase-money, and at the same time possession of the rents and profits of the sold estate. Now, who is in possession of the rents and profits of the estate? Suppose the purchaser, before building on the lots and before completion of the purchase, lets the herbage for cows at 1*l.* a year, or to a neighbour as a potato plot at 1*l.* a year, who can get the rents? There is a perfectly good tenancy by estoppel if by nothing else. I think it plain that Allen could not claim these rents. He has no present right to enter or to claim sixpence. A Court of Equity could restrain him if he attempted to enter and certainly would not grant him a receiver or any other relief in respect of the rents and profits. No doubt in some future event he may have such a right. If default is made in payment of the instalments he may have a right lawfully to enter—lawfully to take such proceedings as he may be advised by giving notice to the tenants, or otherwise acquiring for himself the rents and profits of the land. But that event has not yet arisen. Then the Solicitor-General says, "Oh, but Allen might restrain waste if the purchaser were to dig gravel or something of the kind." Well, so be it. I am not satisfied that he could in a case like this, but so be it; but that is not receipt of rents and profits. That simply means that the equitable owner must not change the character of the security which the vendor has for his unpaid purchase-money. That being in my view the real position of the parties, namely, that the purchaser is, by virtue of the contract, beneficial owner in equity of the property, subject to the vendor's lien for unpaid purchase-money, and as such beneficial owner is entitled to the rents and profits, is it possible to say that Allen is within the definition clause in this Act the owner? The language is "'owner' means the person entitled in possession to the rents and profits of the land in virtue of any estate of freehold." Then there is an exception. In my opinion Allen does not fall within that term. He is not a person who, at the time when these notices were served upon him, was entitled in possession to the rents and profits of the land, and that being so, I think the decision of the learned judge below was quite right, and this appeal must be dismissed with costs.

---

(1) L. R. 5 H. L. 321.

(2) (1876) 2 Ch. D. 499.

SIR SAMUEL EVANS, PRESIDENT. I am of the same opinion, and have very little to add. What we have to do is to construe the definition of "owner" which is to be found in s. 41 of the Act. Now the contention of the Solicitor-General is that "owner" there is defined by technical terms appropriate to a definition of an estate. He says that the word "owner" means in some cases the owner of the legal estate, but in others possibly not the owner of the legal estate; and that the expression "person entitled in possession to the rents and profits of the land in virtue of any estate of freehold" is a definition of an estate of a person entitled to receive and to recover rents and profits. I read the language of the section in its natural sense, and I ask myself what is the meaning of "owner" as here defined? It is the "person entitled in possession to the rents and profits of the land," and when once we find in the particular facts of this case

C. A.
1914

ALLEN
v.
INLAND
REVENUE
COMMISSIONERS.

The President.

who is the person entitled in possession to the rents and profits of the land, that man is the owner within the meaning of s. 41, and the owner therefore within the meaning of s. 19 from whom the undeveloped land duty is recoverable.

Now under this contract there can be no question, I think, but that the purchaser of the plot of land in question, when he was let into possession under the very terms of this contract, was entitled to receive the rents and the profits. In no sense could it be said that under this contract the vendor could be entitled to receive the rents and profits as long as the contract was being carried out. There might come a time, if the instalments were in default, when certain rights would accrue to the vendor, but until such time arrived I am clearly of opinion that the purchaser was "the person entitled in possession to the rents and profits of the land in virtue of an estate of freehold" under the agreement, and therefore he was the owner within the meaning of this definition, and the owner within the meaning of s. 19. The Commissioners of Inland Revenue were wrong in assessing the vendor for the undeveloped land duty; and this appeal from the decision of Scrutton J. must be dismissed.

JOYCE J. I entirely agree with the view expressed by the Master of the Rolls, and I do not think it necessary to add anything.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; W. H. Brown.*

H. C. R.

COMMISSIONERS OF CUSTOMS AND EXCISE *v.* CURTIS.

1913
Dec. 18, 19.

Licensing Acts—New On-Licence—Monopoly Value—Licensing (*Consolidation*) *Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 14.

Licensing justices granted to the holder of an old beer-house licence a licence authorizing him to hold an excise licence "to sell by retail at the licensed premises . . . . spirits" for consumption either on or off the premises:—

Held, that the justices' licence was bad in form inasmuch as justices have no power under the Licensing (Consolidation) Act, 1910, to grant a licence for the sale of spirits only.

By s. 14, sub-s. 1 (*a*), of the Licensing (Consolidation) Act, 1910, the licensing justices on the grant of a new justices' on-licence shall attach to the grant of the licence such conditions as they think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear "when licensed, and the value of the same premises if they were not licensed":—

Held, that the words "if they were not licensed" do not mean "if they were not so licensed," but "if they had no licence at all," and that (upon the assumption that the effect of the grant of the spirit licence coupled with the old beer-house licence was that the premises became fully licensed) the monopoly value of the premises was the difference between their value when fully licensed and their value if unlicensed, and was not the difference between their value when fully licensed and their value with the beer-house licence.

Case stated by the confirming authority for the county of Middlesex.

The inn known as "The Greyhound" situate at Sunbury, Middlesex, had been licensed continually from a date prior to the year 1869 for the sale of beer and wine for consumption either on or off the premises, and the licence (hereinafter referred to as the beer-house licence) was duly renewed by the licensing justices to the respondent Curtis at the general annual licensing meeting held on February 6, 1913. The annual value for excise purposes of the inn as so licensed was 45*l.* The compensation charge under s. 3 of the Licensing Act, 1904, and s. 21 of the Licensing (Consolidation) Act, 1910, in respect of the beer-house licence had been regularly paid, the sum imposed in respect of the last renewal of the beer-house licence being 5*l.*

On February 4, 1913, the respondent, intending to comply with the requirements of s. 15, sub-s. 1 (*e*), of the Licensing (Consolidation) Act, 1910, gave notice in writing of his intention to apply for the grant of a justices' licence authorizing him to hold an excise licence to sell "the following intoxicating liquor, viz. spirits by retail" to be consumed either on or off the premises of the inn.

At their adjourned general annual licensing meeting held on March 3, 1913, the licensing justices granted to the respondent a licence (hereinafter called "the new licence") the form of which, omitting formal parts, was as follows:—

"1913.

"Licensing (Consolidation) Act, 1910.

"At the adjourned general annual licensing meeting holden at the Magistrates' Court at Feltham on the 3rd day of March, 1913, for the division of Spelthorne in the county of Middlesex

"The licensing justices for the said division hereby grant unto Robert James Patrick Curtis of Sunbury this justices' licence authorising him to hold an excise licence to sell by retail at the licensed premises situated at Sunbury known by the sign of the Greyhound, spirits at the said licensed premises for consumption either on or off the premises.

"The owner of the premises in respect of which this licence is granted is Ashby's Staines Brewery Limited of Staines and Bernard Mancha Kilby of Corner Hall, Staines.

"This licence shall be in force from the fifth day of April next until the fifth day of April then next ensuing.

. . . . .

"This licence is granted subject to the payment of one hundred pounds as monopoly value."

The new licence was expressed to be granted subject to the payment of 100*l.* as monopoly value, and that sum in the opinion of the licensing justices and the confirming authority was the difference between the value which the premises would bear when licensed by both the beer-house licence and the new licence and their value as licensed by the beer-house licence only, and therefore this difference was in their opinion the proper monopoly value to be paid upon the grant of the new licence.

The difference between the value of the premises with a full publican's licence and their value if not licensed at all would be largely in excess of 100*l.*

At the meeting of the confirming authority for the county of Middlesex held on May 2, 1913, and by adjournment on May 16, 1913, the respondent applied for a confirmation of the new licence, and the appellants, pursuant to s. 87, sub-s. 2, of the Finance (1909-10) Act, 1910, were heard upon the question of the monopoly value, and the facts above stated were either proved or admitted.

The appellants contended: (1.) That the confirming authority had no jurisdiction to confirm and could not lawfully confirm the new licence, because the condition securing 100*l.* was insufficient to secure to the public the monopoly value of the premises, the sum of 100*l.* not being (in the circumstances above stated) the monopoly value within the meaning of s. 14 of the Licensing (Consolidation) Act, 1910 (1); (2.) that the new licence was not in any of the forms prescribed by the Secretary of State and was therefore incapable of confirmation and void; (3.) that if the new licence had any legal operation it operated as a full licence and put an end to the compensation charge.

The respondent contended (inter alia) that the sum of 100*l.* was a sufficient condition to secure the true monopoly value

(1) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 14, sub-s. 1: "The licensing justices, on the grant of a new justices' on-licence, may attach to the grant of the licence such conditions, both as to the payments to be made and the tenure of the licence and as to any other matters, as they think proper in the interests of the public; subject as follows:—

"(*a*) Such conditions shall in any case be attached as, having regard to proper provision for suitable premises and good management, the justices think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed."

within the meaning of s. 14 of the Licensing (Consolidation) Act, 1910, and that the new licence was valid and ought to be confirmed.

The confirming authority decided to make an order confirming the new licence subject to the opinion of the High Court upon the following question of law:—Whether, on the facts above stated, the new licence contained such conditions as are prescribed by s. 14 of the Licensing (Consolidation) Act, 1910, for securing to the public the monopoly value specified in that section. If the Court should answer the question in the affirmative the order of confirmation was to stand, but if in the negative the order was to be quashed.

Sir J. A. Simon, A.-G., and *F. F. Daldy*, for the appellants. The only licences known to the law are those mentioned in the First Schedule, Scale 2 C, of the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8). There is no such thing known to the law as a grant of a full licence in the case of a house that already has a beer-house licence by means of adding a spirit licence. A retail spirit licence (i.e., a publican's licence) includes the right to sell beer, cider, wine, and sweets: see First Schedule, "Provisions applicable to retailers' licences," in the Finance (1909-10) Act, 1910. If the licensee chooses to renew his beer-house licence he can do so. But he cannot have a renewal of the beer-house licence and add another entity to it unknown to the law. There is no provision for the amount of duty to be paid on such an anomalous and amorphous thing as the balance of a full licence. There is no such thing as a licence to sell spirits by retail. The kinds of licences the justices may grant are prescribed by s. 42 of the Licensing (Consolidation) Act, 1910, and the forms issued by the Secretary of State under that section, and the justices must choose between one of those forms. The justices really granted the respondent a full licence. That licence included the power to sell wine and beer although the respondent had it before. They ought to have told the respondent he could either keep his old beer licence and that in that case he need not pay any monopoly value, or that he could take a full licence and pay the monopoly value. The short history of the monopoly value is that by the Licensing Act, 1904 (4 Edw. 7, c. 23), a great distinction was drawn for the first time between old and new licences. As to old on-licences, although they were granted annually, the holders had an expectation that they might be renewed, and therefore the Legislature provided that they should not be taken away, except upon certain grounds such as mismanagement, &c. Holders of old on-licences were made to contribute to a compensation fund, but they have nothing to do with payment of monopoly value. But so far as regards new licences granted after the Act of 1904 the grantee makes no contribution to the compensation fund and is not entitled to any compensation if his licence is suppressed. But as the new licence confers on him a greater advantage than is represented by the amount of duty payable on it, the licensing justices order him under s. 14 of the Licensing (Consolidation) Act, 1910, to pay a sum which represents the difference between the value of the premises when licensed and when not licensed. In the present case the effect of what the justices did was that a full licence was granted to the applicant, and he must therefore pay the monopoly value, i.e., the difference between the value of the premises with the full licence and their value when unlicensed.

By s. 1 of the Licensing (Consolidation) Act, 1910, the justices must authorize the grant of " the excise licence." They cannot authorize a person to apply for any monstrosity they choose. The excise licence must be granted in accordance with the section. Sect. 12 shews that a sharp distinction is drawn between the grant of a new licence and the renewal of an old one. The effect of what the licensing justices have done is that they have granted the respondent a new full publican's licence, i.e., a licence to sell everything requiring a licence. When the respondent applied for a full publican's licence (as in law he did) he was bound to offer to give up his beer-house licence and take the full licence, and the justices ought to have formed the best opinion they could as to what would be the value of the house for the next twelve months if the full licence were granted. The respondent was not entitled to any compensation on surrendering his beer licence, for under s. 18 of the Licensing (Consolidation) Act, 1910, an applicant is only entitled to compensation if the renewal of an old on-licence is refused. There is no monopoly value attached to the old on-licence. A person cannot hold a beer-house licence and a full licence at the same time. The decision in *Reg.* v. *Licensing Justices of Crewkerne* (1) shews that if an applicant who holds a six-day licence applies for a seven-day licence he must abandon his six-day licence. On giving up an old beer licence the licensee ceases to be liable to contribute to the compensation fund.

Suppose the holder of a beer licence applied for a new on-licence for seven years under s. 14, sub-s. 2, of the Licensing (Consolidation) Act, 1910. How could the monopoly value be fixed if it is the difference between the value of the premises with the new on-licence for seven years and the beer licence which is only renewable for a year and may not last beyond that time? It would be impossible to adequately secure the monopoly value to the public. Some definite capital sum must be arrived at in calculating the monopoly value: *Rex* v. *Customs and Excise Commissioners.* (2)

The appellants are content to treat the justices' grant in the present case as one authorizing the respondent to apply for a full publican's excise licence in order to enable the question as to how the monopoly value is to be calculated to be determined. [Sects. 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 16, 20 and 21 of the Licensing (Consolidation) Act, 1910; s. 47 of the Finance (1909-10) Act, 1910; and *Laceby* v. *Lacon & Co.* (3) were also referred to.]

W. H. Moresby and *M. W. Ashby*, for the respondent. The only question it is desired to argue on behalf of the respondent is what is the proper way of arriving at the monopoly value upon the assumption that the effect of the justices' grant was to authorize the respondent to apply for a full publican's excise licence. The question is what is the true construction of the words "the difference between the value which the premises will bear . . . . when licensed, and the value of the same premises if they were not licensed"? The scheme under which an applicant for a new on-licence has to pay the monopoly value is that he shall pay the value of what he obtains in consequence of the grant of the new licence. In the present case he only obtained the difference between the value which the premises bore when fully licensed and with a beer-house licence only. The word "licensed" occurs twice in the first part of s. 14, sub-s. 1 (*a*), of the Licensing (Consolidation) Act, 1910, and must be given the same meaning in both places. Where it first occurs it is preceded by the word "when," which refers to the time when the justices say to the applicant "you shall have the licence for which you are applying," i.e., "when licensed" means "when so licensed." It follows that the words "not licensed" means "not so licensed." Therefore in the present case if the premises were "not so licensed," i.e., not fully licensed, they would merely be licensed for beer, and the justices have to find the difference between the value of the premises if the application for the new full publican's licence is granted and if it is refused, i.e., if there is merely a beer-house licence. The words "not licensed" mean "not so licensed." They do not mean "not licensed at all." If the Legislature had wished to contrast licensed premises with totally unlicensed premises the expression "unlicensed premises" would have been used. The definition of "licensed premises" in s. 110 of the Licensing (Consolidation) Act, 1910, is precise; the expression is defined as meaning "premises in respect of which a justices' licence has been granted." The natural expression for premises totally unlicensed would therefore be "unlicensed premises" or "if no licence were granted in respect thereof" as in s. 39, sub-s. 2. In *Marwick* v. *Codlin* (1) a licence to sell spirits was added to a wine and beer licence.

---

(1) (1888) 21 Q. B. D. 85.

(2) [1913] 3 K. B. 483.

(3) [1899] A. C. 222.

If the monopoly value is the difference between the value of the premises with the new licence and without any licence the justices on the facts of the present case have secured it to the public. *Rex* v. *Customs and Excise Commissioners* (2) shews that the justices must first arrive in their minds at some definite value and then secure it to the public by some condition. That can be done by other means than the mere payment of money. The public has received the difference between the value of the premises with a full publican's licence and a beer-house licence, namely, 100*l.* It has also had secured to it the difference between the value of the premises with a beer-house licence and no licence. The justices had only a very limited dominion over the beer-house licence because it could only be suppressed on one of the grounds mentioned in the Second Part, clause B, of the Second Schedule to the Licensing (Consolidation) Act, 1910; but they have an absolute dominion over the new licence. That is equivalent to the surrender of the beer licence. No application will be made for its renewal, as it will not be of any use with the full licence in existence. The benefit of that licence has therefore gone or will go to the public. If the argument on behalf of the appellants is upheld the following consequences might ensue. Suppose a person applies for a six-day licence, he must pay the full monopoly value. If he applied in the following year for a seven-day licence he must pay the full monopoly value again, and if in the third year he applied for a full licence he would again have to pay the monopoly value in full. When the respondent gives up his beer licence, although he will cease to be liable to contribute to the compensation fund he will lose his interest in the fund. [Sect. 16 of the Beerhouse Act, 1834 (4 & 5 Will. 4, c. 85), and ss. 24, 35, 36 and 39 of the Licensing (Consolidation) Act, 1910, were also referred to.]

---

(1) (1874) L. R. 9 Q. B. 50.

(2) [1913] 3 K. B. 483.

Sir J. A. Simon, A.-G., in reply. The word "when" in s. 14, sub-s. 1 (*a*), of the Licensing (Consolidation) Act, 1910, means "after being." The word "premises" means "building." There is nothing in the statute which compels a person to apply for a larger licence than he holds. If the respondent prefers to keep his old beer-house licence he must contribute to the compensation fund. If he requires a new licence he obtains it on the definite terms of paying the monopoly value. [*Wernham* v. *Rex* (1) was referred to.]

Cur. adv. vult.

CHANNELL J. The substantial question in this case is as to the true construction of s. 14 of the Licensing (Consolidation) Act, 1910, with reference to the monopoly value there referred to, and which is stated to be "represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed." The whole question I think turns upon the meaning of those last words "the value of the same premises if they were not licensed."

---

(1) [1914] 1 K. B. 468.

The words which I have quoted create no difficulty in the ordinary case where a person who does not possess a licence applies for what is ordinarily called a full licence for the first time. When in that case he applies for and obtains a full licence there is no difficulty, nor if it is refused altogether is there any difficulty. But when the person who applies has already got some kind of a licence, but a different and less important one than that for which he is applying, it is obvious that some difficulty does arise; and it is that difficulty with which we have to deal in the present case. The respondent, who was the applicant for a licence enabling him to sell spirits, had at the time of his application a beer-house licence for the premises. He wanted to have the benefit of selling spirits, and he knew that if he obtained it he would have to pay something called monopoly value, and no doubt he did not want to have included in that value the value of that which he had already got; and so he seems to have devised a scheme for asking for a special and peculiar licence—which he rather invented for himself—for these premises, enabling him to sell spirits only. The only object of making the application in that form could have been that he desired to pay a less monopoly value, and the justices seem to have thought—not without some reason—that he ought to be relieved of the payment of some portion of the monopoly value which would be arrived at if they treated him as having no licence at all, and they accordingly seem to have assisted him by granting him a so-called licence in the form in which he asked for it and estimated his monopoly value in substance at the value of that which they were giving him, i.e., the extra value given to the premises by reason of spirits being sold there in addition to other liquor which had been sold before. The Attorney-General contended on behalf of the appellants—and I really do not think Mr. Moresby contested it—that the form of licence which they professed to grant was

1913

CUSTOMS AND EXCISE COMMISSIONERS v. CURTIS.

Channell J.

wrong. The only effect of the document which the respondent then obtained, coupled possibly with the document which he had already, was to give an authority to him to apply for a full excise licence. That having been done by the licensing justices, the confirming authority confirmed the licence in the form in which it was, not absolutely but subject to this special case, and we have to say whether that confirmation is right or wrong. I am clearly of opinion that it is wrong in point of law, and the Attorney-General would have been entitled to say that he must succeed whatever the merits of the case may be, because the licence could not be confirmed in that form. But inasmuch as the real object of the parties is to ascertain what the true monopoly value is, the Attorney-General did not desire to rely upon that point. I am not quite sure whether Mr. Moresby agreed that on that point the decision must be against the respondent, but I pass that by, merely saying that it is quite clear that the Attorney-General was right when he said that the confirmation of the licence in that form was altogether wrong, and that the only thing which the licensing justices could have done would have been to grant the full licence, which would cover all the privileges of the smaller one.

It is suggested that, in addition to the fact that the respondent might possibly avoid paying the full monopoly value, there might be another reason for his trying if he could to keep the two licences alive, because the old beer-house licence, as it was granted before 1869, had certain special rights attaching to it which might be valuable in certain possible events. I am not sure whether or not it would be possible, if a person chose to pay for it, to keep the two licences alive. One would be a nullity and of no use, but it might be possible, and I am not deciding anything as to that. What I am deciding is that a document purporting to be a partial licence is altogether wrong, and that the only possible effect that the confirming justices or excise authorities could give to an authority to hold such a licence would be—taking into account the beer-house licence—to treat it as an authority to issue a full excise licence.

The next question we have to consider is what is the monopoly value referred to in s. 14, sub-s. 1 (*a*), of the Licensing

1913

Customs and Excise Commissioners v. Curtis.

Channell J.

(Consolidation) Act, 1910, and how is it to be ascertained? I confess I do not myself understand exactly what is meant in the sub-section by "securing to the public any monopoly value." It is a very vague sort of phrase and not one which would be expected to be found in a well drawn Act of Parliament. I think it is what may be designated a platform phrase, a phrase about securing a thing to the public, used by persons who make orations about a matter without any very clearly defined idea of what they really mean. But the words are in the statute. I do not myself see that there is any way in which the monopoly value can be secured to the public—but possibly there may be—except by directing the grantee of the licence to pay it to the public. Whether that is the only way in which it can be done, I do not know, but it is clearly the way which is mainly contemplated, because the section goes on to say how such payments are to be made and how they are to be dealt with. The word "payments" is used though there may possibly be some way of securing the monopoly value to the public which might be allowed to be within the meaning of the section other than by payment. I do not think there is any difficulty in construing the words "when licensed" in s. 14, sub-s. 1 (*a*), of the Licensing (Consolidation) Act, 1910. "When licensed" means after the premises are licensed, i.e., the value which the premises will have beyond the ordinary value and which is given to them by the licence then granted—in this case the full licence. The justices were, therefore, in the present case valuing the grant of a full licence. The section means the licence then granted, which is something more than the applicant has before and which gives that value to the premises. Therefore there is no difficulty about arriving at the amount from which something is to be deducted; it is the value of the premises with the licence which is then being granted. The section then mentions the difference between that amount "and the value of the same premises if they were not licensed," and the question with which we are dealing turns upon the meaning of the words "if they were not licensed." Do those words mean if they were not licensed at all—if they had no licence of any kind—or do they mean if the applicant did not obtain that licence which he was in fact then obtaining?

I am conscious that there is rather a temptation to say they bear the latter meaning. The section is dealing with the grant of a licence which in the opinion of a great many persons—expressed for a long time past and adopted by the Legislature in 1904—gives something which is called "monopoly value" to the premises. The object of the section is to compensate the public for that right which they through the machinery of the licensing laws give to the licensee—for the value of the thing which they are then giving. Therefore one might think that the natural thing for the Legislature to say would be that the monopoly value is to be the difference between the value of the premises if the application is granted and the value that they would bear if it were not granted. The Legislature might have said that, and it would appear to be reasonable to have said it; but if the true meaning of the words in their natural and ordinary sense is a different one, it is not because it would have been a reasonable thing for the Legislature to have said that the Court is justified in cutting down the natural and ordinary meaning of the words in the statute to that meaning. In order to cut it down to that meaning, if the words in their natural sense mean something else, the Court must see in the section itself, bearing in mind the context and the general scope of the legislation, something which necessitates cutting it down to that meaning. Bringing considerations from all points of view to bear upon the section, it is difficult to discover anything of that kind. If we hold that the words "if they were not licensed" mean "if they had not got any licence at all," the case of greatest hardship which would arise would be that of a person who begins by obtaining a beer-house licence. He has on obtaining the beer-house licence to pay monopoly value because the premises are of more value when he has obtained the beer-house licence than if he has not, although they are not of the same value as if he had obtained a full licence. He pays for obtaining the beer-house licence, and having done that, the case is somewhat similar to the present one, except that the respondent never paid for his beer-house licence, because he had an old licence, and therefore obtained it without having made such a payment. But in the case of a new beer-house licence payment would have been made for the beer-house licence, and if that person afterwards obtained a full licence, and had to pay the difference between the value of the premises with the full licence and the value which they would have if they had no licence at all, i.e., were unlicensed premises, he would clearly be paying twice over the value that he had paid for his beer-house licence, and prima facie one would think that the Legislature would not intentionally have enacted that. But it does not by any means follow it has not enacted it. The great difficulty that Courts of law have in interpreting statutes generally arises in dealing with circumstances which one may be reasonably sure were not contemplated when the Act was passed, but in the consideration of which the Court has to construe the language which in fact is used, and apply it to those circumstances, and the Court has to do that although they may think that the result which flows from that construction was not intended. So that the mere fact that a result which one would not expect the Legislature to have contemplated would follow in particular cases is in itself hardly enough to necessitate and therefore authorize the cutting down of words which in their natural sense have a wider meaning.

That brings us to the question whether or not the true and natural meaning of the words "if they were not licensed" is not "if they were not licensed at all." In my judgment that is their true and natural meaning. I tried to see whether I could find —not that that was not the prima facie meaning, because I think it is—that that was not the necessary meaning, and whether it might not be read with the word "so"—a very important though a small word—that is if the words could not be read as meaning "if they were not so licensed." But I am not sure that that construction might not in some special cases produce a result which may not have been intended by the Legislature, and, therefore, although I should desire if it were possible to read in the word "so"—if it were necessary one would be authorized to do it—I do not think we can find such necessity for doing it as to justify it, especially as when possible cases are considered it seems to me that there may be some in which the Legislature may have had a deliberate intention that the other construction should be placed upon the words. For instance, in the case of the respondent, who has obtained a monopoly value without paying for it, the Legislature might think it desirable that he should pay the whole monopoly value, and there may be other cases. It seems to me, therefore, with every desire to interpret the words in the sense in which I think, if I were the Legislature, I should have enacted them, yet I do not find enough to justify me in doing so. Therefore I hold that the words "if they were not licensed" mean "if the premises had no licence at all." That being so, it follows that the licensing justices in this case have not followed the statute, and that the confirming authority in confirming that licence (which, as I pointed out was clearly wrong in form, but we have agreed, with the Attorney-General's consent, to deal with the case on the merits) were wrong in not ascertaining the monopoly value according to the principle upon which the statute on its true interpretation says shall be the monopoly value.

As to "securing to the public" the monopoly value, I confess I do not clearly understand what that expression means. The suggestion was that, having assessed the monopoly value, say in the present case at 400*l*., the justices could direct a payment of 100*l*. only, and treat the other 300*l*. as secured to the public by the abandonment of the rights which the respondent already possessed. I do not think that in any sense in which the words "securing to the public any monopoly value" can be read it could be said that that could be done by taking into account the fact that the old licence would disappear. It is not at all like a case—and I do not know that even that would do—where a person who has another licence for another small public-house somewhere else says, "If you will give me this, I am willing to give up the other one, so that there will not be an increased number of licensed houses in the place." That is not infrequently done. I think it is just possible that might be a way of dealing with monopoly value. I say it is just possible, because I do not understand what "secure" means; but I am sure it does not cover any such thing as took place in the present case. The fact that the beer-house licence would disappear cannot in any sense be a security.

The appeal must be allowed.

1913

CUSTOMS AND EXCISE COMMISSIONERS v. CURTIS.

AVORY J. I am of the same opinion. The question for our decision is whether the monopoly value in this case has been ascertained by the licensing justices and the confirming authority in accordance with the provisions of s. 14 of the Licensing (Consolidation) Act, 1910. The house in question, known as "The Greyhound," had been licensed for many years prior to 1904, indeed prior to 1869, as a beer-house.

This beer-house licence was renewed at the annual licensing meeting in 1913, and at the same meeting, the prescribed notices having been given, the licensing justices granted to the respondent a new publican's or full licence. The licence in form authorized him to hold an excise licence to sell spirits only, but it is admitted that it was in law a full or publican's licence authorizing the sale of spirits, beer, wine, &c., and the grant of the new licence was confirmed by the confirming authority subject to the payment of the sum of 100*l.* as monopoly value, which in the opinion of the licensing justices and the confirming authority represented the difference between the value which the premises would bear when licensed by both the beer-house licence and the new licence and their value as licensed by the beer-house licence only.

It is admitted that the difference between the value of the premises with a full or publican's licence and their value if not licensed at all would be largely in excess of 100*l.* The construction put upon s. 14, sub-s. 1 (*a*), of the Licensing (Consolidation) Act, 1910, by the justices in this case appears to be equitable, and I should have been glad to adopt it if I could see my way to do so. But it appears to me that when the new publican's excise licence is granted in pursuance of the authority given by the justices' licence the beer-house licence will be absorbed or merged in it and will cease to exist as a separate licence. The duty payable on the corresponding excise licence under s. 43 of the Finance (1909-10) Act, 1910, is a duty equal to half the annual value of the licensed premises which by s. 44 of that Act is the amount by which the annual value of the premises as licensed premises exceeds the annual value which the premises would bear if they were not licensed premises. And having regard also to s. 20 of the Licensing (Consolidation) Act, 1910, which relates to the compensation to be paid on the refusal of the renewal of an old licence, I have come to the conclusion that the monopoly value in this case ought to have been calculated on the same basis as provided in those sections, that is to say, on the difference between the value which the premises would bear in the opinion of the justices when licensed as a fully licensed house and the value of the same premises if they were not licensed at all.

I think that the circumstances which have arisen in this case were probably not in the contemplation of the Legislature when s. 14 of the Licensing (Consolidation) Act, 1910, was passed. That may be a reason for further legislation, but it does not justify a construction of the section which, in my opinion, was not intended.

Atkin J. I agree that this appeal ought to be allowed. It is unnecessary to deal with the facts further than to state that the respondent, who held an old beer-house on-licence,—one which we are told was within the meaning of the Licensing (Consolidation) Act, 1910, an old beer-house licence, that is to say, a licence which had originally been granted before 1869—obtained on February 6, 1913, at the general annual licensing meeting a renewal of his old beer-house licence, and on February 4, 1913, he gave notice of his intention to apply for a full licence, which was granted to him at the adjourned general meeting of the justices on March 3, 1913.

That application was for a new justices' on-licence as defined by s. 12 of the Licensing (Consolidation) Act, 1910, which is there said to be "a justices' licence granted at a general annual licensing meeting otherwise than by way of renewal or transfer." The justices granted him that full licence, and that full licence entitled him to sell, not merely spirits, but any other kind of intoxicating liquor, and therefore entitled him to sell beer. When I say "entitled him to sell not merely spirits, but beer," I mean that it entitled him to obtain an excise licence which would entitle him to sell spirits or beer. He therefore applied for and was granted a new justices' on-licence within the meaning of s. 14.

Then one has to consider what is the meaning of the provision of paragraph (*a*) of sub-s. 1 of that section. It appears to me that the true construction of the words in question is that they mean that the Court is to estimate the difference between the capital value of the house possessing the right to sell the intoxicating liquors that are mentioned in the licence which is the subject of the grant and the value of the house not possessing the right to sell intoxicating liquors mentioned in the grant, and I think that must be the true meaning of the statute. Nor do I consider that that works necessarily such an absurdity that we ought not to give their plain meaning to the words of the Act of Parliament. It is apparent that by obtaining this new licence the respondent obtained in fact that which the Act of Parliament calls for this purpose a monopoly, and henceforth he will derive his right to sell beer from that licence.

I do not wish to deal in this case with the question as to whether or not the old licence will be merged or abandoned when he obtains the new excise licence. I do not think it is necessary and I have some doubts as to how exactly it can be said to be either merged or abandoned, but I think it is quite plain that in practice the substance of the matter would be that after the one year for which the licence still operated the right to sell beer would be derived from the renewal of the new full licence which was granted, and that from that time his monopoly would be created by the existence of that licence or its renewal. That I think gives him the monopoly, and I think the price of that monopoly—to use a word which is of course not in the statute—the price which is charged for that monopoly is the same, and is probably meant to be the same, whatever the condition of the person is who applies, whether he already possesses partial rights or not; each person is to pay the same price for the monopoly. If you could assume, which of course does not happen, that there were competitors for a full licence for this house, it seems to me that it would be fair and right that the price for the monopoly should be the same to the man who held a former beer licence as to a new applicant who had not held a licence at all. I only mention that by way of indicating that in my opinion we are not driven by any such hardship as would make the construction put upon this section by the appellants an absurdity, to depart from that which I consider to be the true meaning of these words.

In those circumstances I agree that this appeal ought to be allowed.

Appeal allowed and order of confirming authority quashed.

Solicitor for appellants: *W. M. Graham-Harrison.*
Solicitor for respondent: *H. Dale, Staines.*

J. E. A.

1914
Jan. 20, 21.

TAYLOR *v.* NATIONAL AMALGAMATED APPROVED SOCIETY.

County Court—Practice—Appeal—Point of Law not raised in County Court—Point going to Jurisdiction of the Court—National Insurance Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 55), *s.* 67*—National Insurance Act,* 1913 (3 *&* 4 *Geo.* 5, *c.* 37), *s.* 27.

The rule that there is no appeal from a county court except upon a point of law taken in that Court applies even when the ground of appeal is that the jurisdiction of the county court in the matter in question has been ousted by a public statute.

By s. 67 of the National Insurance Act, 1911, subject to certain provisions not material, every dispute between an approved society and an insured person who is a member of such society relating to anything done or omitted by such person or society is to be decided according to the rules of the society. The rules of the defendant society provided that disputes between insured members and the society should be decided by arbitration.

By s. 27 of the National Insurance Act, 1913, any dispute between an approved society and any person as to whether that person is or was at any date a member of that society is to be decided in like manner as a dispute between an approved society and an insured person who is a member thereof and s. 67 of the Act of 1911 is to apply accordingly.

The plaintiff claimed to be a member of the defendant society and as such entitled to payments under a contract of insurance with the society, who denied that the plaintiff was a member. The plaintiff brought an action in the county court. The defendants gave notice of a special defence under s. 67 of the National Insurance Act, 1911, insisting that the county court had no jurisdiction in the matter. The county court judge gave judgment for the plaintiff, holding that s. 67

of the Act of 1911 applied only to disputes between the society and one who was admittedly a member thereof. Sect. 27 of the Act of 1913 was not brought to the attention of the county court judge. The defendants appealed on the ground that the jurisdiction of the county court was ousted by s. 27 of the Act of 1913:—

Held, that this point not having been taken in the county court could not be raised on appeal, and that the decision of *Smith* v. *Baker* [1891] A. C. 325 applied, even though the point under appeal was one touching the jurisdiction of the county court.

APPEAL from the county court of Warwickshire holden at Coventry.

The plaintiff brought an action in the county court claiming the sum of 9*l.* 10*s.* under a contract of insurance made between the plaintiff and the defendants whereby the defendants became liable to pay to him the sum of 10*s.* per week in the event of his disablement through sickness; in his particulars he stated that he was disabled from following his employment by sickness from January 17 to May 31, 1913, and claimed the sum of 9*l.* 10*s.*, for nineteen weeks at 10*s.* a week.

The defendants gave notice of a special defence setting up s. 67 of the National Insurance Act, 1911 (1), and alleging that

---

(1) National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55), s. 67: "(1.) Subject to the provisions of the foregoing section" (which relates to matters to be decided by the Insurance Commissioners) "every dispute between (*a*) an approved society or a branch thereof and an insured person who is a member of such society or branch or any person claiming through him . . . . relating to anything done or omitted by such person, society, or branch (as the case may be) under this Part of this Act or any regulation made thereunder, shall be decided in accordance with the rules of the society, but any party to such dispute may, in such cases and in such manner as may be prescribed, appeal from such decision to the Insurance Commissioners."

Rule 43 of the society was headed "Disputes" and provided as follows:—

"(1.) If any dispute shall arise between an insured member or a person who has ceased to be an insured member, or person claiming through such member or person, or under the rules, and the society, or the committee of management, or any officer of the society, it shall be decided by arbitration."

Sub-section (2.) related to the appointment of arbitrators; sub-section (3.) to the expenses of the arbitration.

Sub-section (4.) was in these terms: "In this rule the term 'member' shall include a person aggrieved who has ceased to be a member."

National Insurance Act, 1913 (3 & 4 Geo. 5, c. 37), s. 27: "(1.) Any dispute between an the county court judge had no jurisdiction to try the action and that the matter should be referred to arbitration in accordance with rule 43 of the defendant society.

The case came on for hearing on November 7, 1913.

The county court judge held that s. 67 of the Act of 1911 only applied to disputes between the society and a person who was admittedly a member, and had no application in a case where the only dispute was whether a person was or was not a member. He gave judgment for the plaintiff for a declaration that on January 17, 1913, he was a member and entitled to be treated as a member of the defendant society, and for 9*l.* 10*s.* damages. Leave to appeal was given.

The defendants appealed. The grounds of appeal were that the county court judge was wrong—

1. In holding that he had jurisdiction to try the action having regard to the National Insurance Act, 1911, and the rules of the defendant society;

2. In allowing the plaintiff after judgment to amend his particulars of claim by claiming a declaration that he was a member of the defendant society;

3. In holding that he had under his equitable jurisdiction power to try the action in the amended form;

4. In holding that he had power to assess the amount payable to the plaintiff and deciding that the same should not be assessed by arbitration in accordance with the rules of the defendants.

A. S. Comyns Carr, for the appellants. The county court judge had no jurisdiction to hear this case. Sect. 67 of the National Insurance Act, 1911, provides that disputes between a society and its members are to be settled according to the rules of the society in question, i.e., in the present case, according to rule 43 of the appellant society, by arbitration. The county court

---

approved society and any person as to whether that person is or was at any date a member of that society for the purposes of Part I. of the principal Act"—i.e., the National Insurance Act, 1911—"shall be decided in like manner as a dispute between an approved society and an insured person who is a member thereof . . . . and section 67 of the principal Act shall apply accordingly."

judge held that s. 67 only applied to disputes between the society and those who are admittedly members; but when he had decided that the respondent was a member, the case came strictly within s. 67. The Court ought then to have left the parties to go to arbitration under rule 43.

Sect. 67 of the Act of 1911 has been amended by s. 27 of the National Insurance Act, 1913, which makes it clear that a dispute as to whether a person is or is not a member of a society is also to be decided by the rules of the society.

Not having jurisdiction to decide the question of the respondent's membership the county court judge ought not to have made a declaration that he was a member: *Barraclough* v. *Brown*, per Lord Davey. (1)

R. A. Willes, for the respondent. As to s. 67 of the Act of 1911 it is clear from cases decided on the similar section of the Friendly Societies Act, 1875, that the jurisdiction of the county court is only ousted in cases where the dispute is between the society and one who is admittedly a member. Where the officers of a society have denied the membership of a claimant they cannot be heard to say that the question of his membership is a dispute between the society and a member: *Prentice* v. *London* (2); *Willis* v. *Wells* (3); *Palliser* v. *Dale*. (4) The county court therefore had jurisdiction to try the question of membership and consequently to give incidental relief: *Blue* v. *West Kilbride Free Gardeners' Society*. (5)

As to s. 27 of the Act of 1913, this point was never brought to the attention of the county court judge. Therefore there can be no appeal upon it: County Courts Act, 1888, s. 120; *Smith* v. *Baker*. (6)

Comyns Carr in reply. The point arising on s. 27 of the Act of 1913 is one going to the jurisdiction of the Court, which is bound to know the limits of its jurisdiction: *Norwich Corporation* v. *Norwich Electric Tramways Co.* (7) No new matter is introduced into the case; the point is patent on the materials before

---

(1) [1897] A. C. 615, at p. 623.
(2) (1875) L. R. 10 C. P. 679.
(3) [1892] 2 Q. B. 225.
(4) [1897] 1 Q. B. 257.
(5) (1866) 4 M. 1042.
(6) [1891] A. C. 325.
(7) [1906] 2 K. B. 119.

1914

TAYLOR
v.
NATIONAL
AMALGAMATED
APPROVED
SOCIETY.

the Court below: *Misa* v. *Currie* (1); *Connecticut Fire Insurance Co.* v. *Kavanagh* (2); *Ex parte Firth, In re Cowburn* (3); *The Tasmania.* (4) This was not a defence of which notice need have been given under s. 82 of the County Courts Act, 1888, or under Order x., r. 18, of the County Court Rules, 1903 and 1904, although, if it were, sufficient notice has been given: *Renton* v. *King* (5); *Gregory* v. *Torquay Corporation.* (6)

Ridley J. This appeal fails and the judgment of the county court judge must be affirmed. The plaintiff claimed as a member of the defendant society to be entitled under the rules of the society to a sum of 9*l.* 10*s.*, being insurance benefit at the rate of 10*s.* a week while he was disabled from sickness. The defendants denied that the plaintiff was a member. When the case came before the county court they gave him notice that they would take the point that under the National Insurance Act, 1911, the county court had no jurisdiction in the matter. The substantial question before that Court was whether the plaintiff was or was not a member of the defendant society. The county court judge having heard the evidence of the plaintiff decided that he was a member of the society, and made a declaration accordingly awarding the sum of 9*l.* 10*s.* and holding that, as the defendants had denied the membership of the plaintiff, s. 67 of the National Insurance Act, 1911, did not apply, its only application being to cases where the claimant to benefit was admittedly a member of the society. In my opinion the county court judge was right in so holding. The cases which have been cited shew that under the Friendly Societies Acts it has been held that in order to oust the jurisdiction of the Courts the dispute must be between a member and the trustees of the society, but that if the membership of the claimant is denied, the matter is not one to be decided solely under the rules of the society but can be entertained by the Courts. In *Prentice* v. *London* (7) the trustees of the society,

---

(1) (1876) 1 App. Cas. 554, at p. 559.

(2) [1892] A. C. 473, at p. 480.

(3) (1882) 19 Ch. D. 419.

(4) (1890) 15 App. Cas. 223, at p. 225.

(5) (1905) 21 Times L. R. 577.

(6) [1912] 1 K. B. 442.

(7) L. R. 10 C. P. 679.

1914

TAYLOR
v.
NATIONAL
AMALGA-
MATED
APPROVED
SOCIETY.

Ridley J.

having denied the plaintiff's right to be considered a member of the society, were held to be estopped from asserting that the dispute was one between the society and one of its members within the meaning of a rule providing for the settlement of such disputes. That decision applies to the present case. As the officers of the defendant society have all along denied the membership of the plaintiff they are estopped from asserting that this dispute is one between themselves and one of their members. That case was followed in *Willis* v. *Wells* (1) and *Palliser* v. *Dale.* (2) The Scotch case of *Blue* v. *West Kilbride Free Gardeners' Society* (3) shews that once the Court has established the right to hear the case it may hear it to its conclusion and, if the decision is in favour of the plaintiff, assess the amount to which he is entitled. Therefore the statutory defence under s. 67 of the National Insurance Act, 1911, failed.

But then it was urged by Mr. Comyns Carr that on September 1, 1913, the National Insurance Act, 1913, came into operation, and that by s. 27 of that Act, following the precedent of s. 6 of the Friendly Societies Act, 1908, it was enacted that any dispute as to whether a person was a member of the society in question should be decided under the rules of the society in like manner as a dispute between the society and an insured person who is a member thereof.

If this later enactment had been brought to the attention of the county court judge he would no doubt have held that its effect was to take out of his jurisdiction the point which the earlier Act had left within his cognizance. But the Act of 1913 was never brought to his attention. Mr. Comyns Carr contends that as this is a point going to the jurisdiction of the county court it can be taken at any time, and that there was no need to take it in the Court below, which is bound to know the limits of its jurisdiction. Probably in the case of the High Court this contention might be sound, in view of the decision in *Norwich Corporation* v. *Norwich Electric Tramways Co.* (4), where Vaughan Williams L.J. said (5): "The first point made for the plaintiffs in answer to that contention"—i.e., that the dispute should be disposed of by some person nominated by the Board of Trade—"is that it is too late at the present stage of the proceedings to raise this objection to the jurisdiction, and that it ought to have been raised at the trial. I can only say with regard to that point that I have always supposed it to be well-established law that the objection that the tribunal has no jurisdiction to entertain the case is one which, at all events in reference to proceedings in the High Court, may be taken at any time. If the Court in any case is itself satisfied that it has no jurisdiction to entertain the application made, it is its duty, in my opinion, to give effect to that view, taking, if necessary, the initiative upon itself." But it does not follow that the same rule applies to the county court. In my view the same rule does not apply. In *Smith* v. *Baker* (1) Lord Halsbury L.C. speaking of appeals from county courts said (2): "A matter of law can be made the subject of appeal, but then only when the point has been raised at the trial before the learned judge." Therefore in an appeal from the county court any objection to the jurisdiction which the appellant seeks to raise in the Divisional Court must first have been taken in the Court below; otherwise it cannot be entertained. It follows that this appeal must be dismissed.

---

(1) [1892] 2 Q. B. 225.

(2) [1897] 1 Q. B. 257.

(3) 4 M. 1042.

(4) [1906] 2 K. B. 119.

(5) Ibid. at p. 125.

BANKES J. I am of the same opinion. The only question we have to decide is whether the defendants, having taken the course of appealing, are entitled to succeed, their contention being that the county court had no jurisdiction to hear the case. Many points have been urged. The plaintiff by his particulars of claim alleged in general terms that he was entitled to a sum of 9*l*. 10*s*. under a contract of insurance between himself and the defendant society. In this way he raised the issue whether he was a member, the defendants having challenged that claim from the beginning. The defendants gave notice of a statutory defence confining themselves to s. 67 of the Act of 1911. Mr. Comyns Carr has argued, and I agree with him, that a defence going to the jurisdiction of the Court is not a statutory defence within the meaning of the County Court Rules, 1903 and 1904, Order x., r. 18,

(1) [1891] A. C. 325.
(2) Ibid. at p. 333.

and that it is not necessary to give notice of such a defence. However, when the matter came before the county court judge the only point taken was that his jurisdiction was ousted by s. 67 of the Act of 1911. The point of law thus raised was whether the terms of that section were sufficient to oust the jurisdiction of the county court. The county court judge decided that, inasmuch as the question before the Court was whether the plaintiff was a member of the society, he was entitled to exercise his jurisdiction on the authorities to which his attention was called, and I think it is plain that *Prentice* v. *London* (1) and the cases which followed it do decide that a statute providing that disputes between a society and a member shall be decided by arbitration does not remit to arbitration the question whether a person is or is not a member. Therefore the judge was right on that part of the case.

Then it was objected that the judge amended the particulars of claim by adding a claim for a declaration and so gave himself jurisdiction. That point is not well founded, because the particulars were wide enough to include a claim for a declaration, and moreover the case of *Blue* v. *West Kilbride Free Gardeners' Society* (2) establishes that once the Court has jurisdiction to decide whether a claimant is a member, it has a right to give consequential relief claimed in the action or matter before the Court, and it is not true to say that the county court having decided the issue of membership in favour of the plaintiff must then and there stay its hand and leave the plaintiff to proceed to arbitration.

Therefore the only question is whether it is competent to the defendants to challenge the jurisdiction by way of appeal, not having raised that particular point of law before the county court. The case of *Smith* v. *Baker* (3), which followed on *Clarkson* v. *Musgrave* (4), decided that a party can only appeal from the county court on a point of law which has been raised in the Court below. The reason for this is not merely to provide that there may be a record of the evidence upon the point. The case of *Clarkson* v. *Musgrave* (4) was decided on s. 6 of the County

---

(1) L. R. 10 C. P. 679.

(2) 4 M. 1042.

(3) [1891] A. C. 325.

(4) (1882) 9 Q. B. D. 386.

Courts Act, 1875, which for all material purposes is the same as s. 120 of the Act of 1888. In that case Field J. said (1): "Then the section provides further that at the trial or hearing the judge shall, at the request of either party, 'make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon,' and he shall furnish a copy of the note so taken by (quære to) the person requiring the same for the purpose of appeal. I am clearly of opinion that every question of law upon which it is desired to appeal must be raised at the trial. Unless it is, there is no 'ruling, order, direction, or decision of the judge' within s. 6 upon which to appeal." The scheme of the legislation is that there shall be no appeal from the county court except upon questions of law, and only on those questions of law which have been brought to the attention of the judge and on which he has been asked to decide. In the present case the county court judge has not been asked to decide upon the point under appeal, and therefore the appeal fails.

Appeal dismissed.

Solicitors for appellants: *Kingsley Wood & Co.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for R. Hollick, Coventry.*

W. H. G.

---

(1) 9 Q. B. D. at p. 391.

EASTWOOD *v.* McNAB AND ANOTHER.

1914
Jan. 22.

Landlord and Tenant—Lease—Covenant by Lessee—"Assessments charged on the premises"—Inhabited House Duty—Landlord assessed by Mistake—Payment by Landlord—Implied Request.

A lessee under a lease covenanted to pay all assessments charged upon the demised premises:—

Held, that inhabited house duty was charged upon the premises within the meaning of the covenant.

Before the making of the lease the lessor was assessed to landlord's property tax and to inhabited house duty, the demands in respect of both the tax and the duty being by her directions sent to her bankers and paid by them. After the making of the lease the same course was pursued; the lessor continued to be assessed to inhabited house duty; she did not appeal against the assessment, and the duty continued to be paid by her bankers on her account:—

Held, that the lessor not having appealed was bound by the assessment and liable to pay the duty, and that, having paid it, she was entitled to recover from the lessee the amount paid as upon an implied request by the lessee to pay the duty and an implied promise by the lessee to refund the amount paid.

Appeal from the Westminster County Court.

By a lease dated April 17, 1905, Rosalie Josephine Eastwood demised to Christine Hearne McNab and Frances Agnes Adney a house numbered 67, Curzon Street, Hanover Square, for a term of twenty-one years from March 25, 1905, at the yearly rent of 400*l.* payable by four equal quarterly payments as therein mentioned.

The lease contained a covenant by the lessees in these terms: The lessees "will pay bear and discharge (in addition to the rent) all rates taxes duties assessments charges impositions and outgoings whatsoever of an annual nature whether parliamentary parochial or of any other description which now are or during the term shall be imposed or charged on the premises or the owner or occupier in respect thereof except landlord's property tax, land tax" &c.

Before the making of this lease the plaintiff, the lessor, was assessed to inhabited house duty. The demands for this duty and for landlord's property tax were made on one demand note which, by the plaintiff's instructions, was sent to her bankers, and they on receipt of the demand note paid both the inhabited house duty and the landlord's property tax. After the making of the lease the same course was pursued; the plaintiff continued to be assessed to inhabited house duty and did not appeal against this assessment; and her bankers, as theretofore, paid both the inhabited house duty and the landlord's property tax, purporting to do so on her behalf.

The action was brought to recover a sum of 80*l.* 12*s.* 6*d.*, in respect of inhabited house duty so paid by the plaintiff, as money paid by her at the implied request of the defendants, who, as the plaintiff alleged, were liable to pay this duty, being a duty, assessment, charge, imposition or outgoing "charged on the premises" within the meaning of the covenant in the lease.

The following statutes relating to inhabited house duty were cited during the argument:—

The House Tax Act, 1803 (43 Geo. 3, c. 161), s. 10, enacted that every dwelling-house occupied at the date of assessment should be brought into charge in respect of the duties specified in Sched. A to that Act, according to the number of windows therein, and proceeded to enact that every dwelling-house and other premises therewith occupied, and by the Act charged, being together of the annual rent therein mentioned, shall also be brought into charge in like manner, according to the full and just yearly rent at which the same is really and bona fide worth to be let in respect of the duties set forth in Sched. B to the Act.

By s. 15 every house charged with the duties becoming unoccupied as therein mentioned is to be charged to the said duties for the whole year on the former occupier, or the occupier for the time being, unless notice in writing be given to the assessor of the place of the house becoming unoccupied.

By s. 62 the assessors acting in execution of the Act are directed to bring in their certificates of assessments in writing under their hands of every dwelling-house inhabited or not inhabited within the limits of the places for which they act, and of the full and just yearly rent which every such dwelling-house with the offices and premises by the Act charged is really worth, estimated according to the Act, together with the names and surnames of the several occupiers or inhabitants of each dwelling-house and of the several sums of money they respectively ought to pay in each case without concealment or favour.

Sched. A to this Act was headed "A schedule of the duties made payable for every dwelling-house within and throughout Great Britain according to the number of windows or lights in each." It contained a number of "Rules for charging windows or lights" as follows:—

"1. The said several duties to be charged annually in respect of the windows or lights in every dwelling-house, with the household and other offices herein enumerated.

"2. All skylights and all windows and lights however constructed . . . . to be charged to the said duties.

"3. Every window or light in any kitchen, cellar, scullery . . . . belonging to or occupied with any dwelling-house . . . . shall be charged to the said duties.

"4. The said duties to be charged yearly upon the occupier or occupiers of the houses . . . . in respect whereof the said duties shall be charged, and to be in force for one whole year . . . .

"5. Where any change in the occupation of any house, ... shall take place after the assessment shall be made, then and in such case the duties hereby directed to be charged on the occupier or occupiers of houses, ... for one year shall be levied upon and paid by the occupier or occupiers, landlord or landlords, owner or owners, for the time being, or on both or all of them, according to their times of possession thereof, without any new assessment, notwithstanding such change in the occupation of such house . . . . for the year that such house shall have been assessed: Provided, that where a tenant of any house . . . . shall quit the same, on the determination of the lease or demise thereof, after an assessment shall be made, and shall have given notice thereof to the assessor for the place, the duty thereon shall be discharged by the Commissioners for executing this Act for the remainder of that year, in case it shall appear to the said Commissioners at the end of such year, that such house . . . . shall have continued wholly unoccupied for and during the remainder of such year."

Sched. B was headed "A schedule of the duties made payable on all inhabited dwelling-houses throughout Great Britain, according to the value thereof." It described the duty in the following terms:—"For every such inhabited house which, with the household and other offices, yards, and gardens therewith occupied and charged, are or shall be worth the rent hereinafter mentioned by the year, there shall be charged the yearly sums following; viz.," &c. It also contained a number of "Rules for charging the said last mentioned duties" as follows:—

"1. The said last mentioned duties to be charged annually on the occupier or occupiers for the time being of every such dwelling-house, being of the annual rent of *5l.*" [now *20l.*] "or upwards . . . . and to be levied on him, her, or them, or on his, her, or their respective executors or administrators, and in like manner in case of a change in the occupation thereof as is before directed in respect of the duties on windows or lights, and in addition to the duties contained in Schedule A."

The House Tax Act, 1808 (48 Geo. 3, c. 55), repealed the schedules to the Act of 1803 and in lieu of the duties granted thereby enacted that there should be assessed, raised, and levied upon houses, windows, and lights as set forth in Sched. A, and upon inhabited houses as set forth in Sched. B, the new and consolidated duties described in the several schedules respectively marked as aforesaid. Sched. A was headed "A schedule of the duties made payable for every dwelling-house within and throughout Great Britain, according to the number of windows or lights in each dwelling-house and the offices to be charged therewith." It contained a number of "Rules for charging windows or lights" of which the first five were the same as the first five rules in Sched. A to the Act of 1803.

Sched. B to the Act of 1808 was headed "A schedule of the duties made payable on all inhabited dwelling-houses throughout Great Britain, according to the value thereof, and of the offices and lands to be charged therewith." It described the duties in the same terms as did Sched. B in the Act of 1803 and contained "Rules for charging the said last mentioned duties," of which r. 1 was in the same terms as r. 1 in Sched. B of that Act.

By the House Tax Act, 1851 (14 & 15 Vict. c. 36), s. 1, in lieu of the duties assessed and levied on dwelling-houses according to the number of windows or lights therein under 48 Geo. 3, c. 55, there are to be assessed, raised, levied, collected, and paid upon inhabited dwelling-houses the several duties set forth in the schedule to the Act payable according to the annual value of the dwelling-houses.

By s. 2 the duties are to be denominated and deemed to be duties of assessed taxes and to be under the care and management of the Commissioners of Inland Revenue; and all powers, provisions, rules, regulations, and directions, &c., then in force contained in any Act or Acts relating to the duties of assessed taxes, and also all powers, provisions, rules, regulations, directions, &c., contained in or enacted by any such Act or Acts as aforesaid, with reference to the duties on inhabited dwelling-houses according to the value thereof as set forth in the schedule marked B to the Act of 48 Geo. 3 are to be in full force and effect with respect to the duties granted and to be applied and put in execution for assessing, raising, levying, collecting and securing the duties.

The schedule contains the duties by the Act made payable upon inhabited dwelling-houses in and throughout Great Britain, according to the annual value thereof; that is to say "For every inhabited dwelling-house which, with the household and other offices, yards, and gardens therewith occupied and charged, is or shall be worth the rent of twenty pounds or upwards by the year" &c. as therein directed.

The Taxes Management Act, 1880 (43 & 44 Vict. c. 19), provides by s. 5 that the expression "Tax Acts" means and includes "Any Act or part of any Act relating to the assessment of any person, land, tenement, heritage, property, or profits whatever to the income tax or to the inhabited house duties."

By s. 49 every assessor is to deliver to the Commissioners his certificates of assessments under Scheds. A and B of the Income Tax Acts and of inhabited house duties.

By s. 56, sub-s. 1, after the surveyor has examined the assessments delivered by the assessors, the General Commissioners are to take them into consideration; and in case the surveyor has not objected to the assessments and the Commissioners are satisfied that they have been made truly and without fraud, and so as to charge the properties and persons contained therein with the full duty which ought to be charged, the Commissioners are to sign and allow the assessments.

By s. 57, sub-s. 1, so soon as any assessment of the duties for a parish is signed and allowed, notice of appeal meetings is to be given as prescribed by the Income Tax Act, 1842, and the clerk is to inform the surveyor thereof.

By s. 80 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), such a notice may be given either by delivering a copy of the assessment to the assessor of the parish or place for the inspection of the parties charged thereby, together with a public notice of the day of appeal, or by delivering to each party charged the amount of his assessment together with a note of the day of appeal. Such notices are to be made and given at least fourteen days before the day of appeal.

By s. 57, sub-s. 2, of the Taxes Management Act, 1880, all appeals against the inhabited house duties are to be determined in like manner as appeals under Sched. A to the Income Tax Acts. By sub-s. 3 a person aggrieved by an assessment upon him included in any first or additional first assessment, on giving ten days' notice of objection in writing to the surveyor within the time limited for hearing appeals, may appeal to the General Commissioners against the assessment within twenty-one days after the date of the notice of such assessment to the party charged therewith. By sub-s. 5 the General Commissioners are to cause notice of the day of appeal to be given to the appellants, and to meet together from time to time, with or without adjournment, until all appeals shall have been determined. By sub-s. 6 the Commissioners shall not, upon the hearing of any such appeal, make an abatement or reduction in the charge made upon any person by assessment or surcharge by any assessor or surveyor, but the charge or surcharge shall stand good and remain part of the annual assessment, unless it shall, upon the hearing of such appeal, appear to the Commissioners then present, or the major part of them, by examination of the appellant upon oath or affirmation, or by other lawful evidence to be produced by him, that such person is overcharged in or by such assessment or surcharge.

By s. 86, sub-s. 1, if a person refuses to pay the sum charged upon him by virtue of the Land Tax Acts, the Tax Acts, or this Act, on demand made by the collector, according to the assessments and warrants to him delivered by the Land Tax and General Commissioners, such collector may, and he is thereunto authorized and required, for non-payment thereof, to distrain upon the messuages, lands, tenements and premises charged with such sum of money, or to distrain the person so charged by his goods and chattels, and all such other goods and chattels as the collector is thereby authorized to distrain, without any further authority from the said respective Commissioners for that purpose than the warrant to such collector delivered on his appointment.

The county court judge gave judgment for the defendants, holding that the plaintiff, not being the occupier of the demised premises, was not liable to pay inhabited house duty in respect of them; that the payment of the duty by her being therefore merely voluntary, there was no request by the defendants implied by law that the plaintiff should pay on their behalf. He therefore gave judgment for the defendants.

The plaintiff appealed.

A. M. Latter, for the plaintiff. The county court judge was wrong in holding that the payment of the duty by the plaintiff was merely voluntary. Inhabited house duty is a charge upon the premises in respect of which it is imposed. By s. 10 of the House Tax Act, 1803, the house is "brought into charge." Sect. 15 speaks of the house "charged with the duties"; s. 62 mentions "every such dwelling-house with the offices and premises by the Act charged." In Sched. B were the words "every such inhabited house with which the household and other offices" &c. "therewith occupied and charged." Sched. B to the Act of 1808 is to the same effect. So is the schedule to the Act of 1851. Sect. 56 of the Taxes Management Act, 1880, describes an assessment as "charging the properties and persons contained therein." The cases of *Juson* v. *Dixon* (1) and *MacGregor* v. *Clamp & Son* (2) have decided that this duty was a charge on the premises. That of itself is enough to take the payment by the plaintiff out of the category of voluntary payments. She was entitled to discharge her property from the charge. It is the duty of the party assessed to seek out the collector and pay the duty: *Davis* v. *Burrell.* (3) The defendants have covenanted to pay all duties charged on the demised premises. They have therefore no defence to the action.

F. E. Bray, for the respondent McNab. The duty never became charged on these premises. In order to impose the duty various formalities have to be observed. By s. 62 of the Act of 1803 assessors have to bring in certificates of assessments of dwelling-houses with the yearly rent "together with the names and surnames of the several occupiers or inhabitants of each dwelling-house." The duty is in the first instance charged upon the occupier: Sched. A, r. 5, and Sched. B, r. 1, to the Act of 1803, repeated in Sched. B, r. 1, to the Act of 1808, and confirmed by s. 2 of the Act of 1851. By s. 56, sub-s. 1, of the Taxes Management Act, 1880, when the Commissioners are satisfied that the assessments have been made so as to charge the properties and persons contained therein, they sign and allow the assessments. By s. 57, sub-s. 1, as soon as the assessments have been signed and allowed, notice of appeal meetings is to be given as prescribed by the Income Tax Act, 1842, i.e., by s. 80 of that Act to the party charged with the duty, in other words the occupier of the house. Only through the occupier does the duty ever attach to the house. In the present case the occupier was never assessed. The burden of paying the duty cannot be imposed upon the occupier by assessing some one else. If it could, the effect would be to charge a man without giving him the opportunity of being heard. Consequently the duty in this case has never been imposed. It follows that the payment by the plaintiff was merely voluntary and no request of the defendants can be implied: *In re National Motor Mail-Coach Co., Clinton's Claim.* (1)

---

(1) (1813) 1 M. & S. 601.

(2) [1914] 1 K. B. 288.

(3) (1851) 10 C. B. 821.

The defendants' covenant to pay all assessments and impositions "charged on the premises" applies only to assessments and impositions which are charged upon the premises in a strict conveyancing sense, i.e., in the sense that an equitable interest in the land is created. The Acts relating to inhabited house duty do not create any such charge; they merely charge the occupier in relation to the premises and only confer a right of distress and not a right of sale if the duty is not paid: Taxes Management Act, 1880, s. 86, sub-s. 1.

J. R. Bell Hart, for the defendant Adney, adopted the foregoing argument.

Latter in reply. The plaintiff on being assessed might have appealed. Not having done so, the assessment became binding upon her by s. 56, sub-s. 6, of the Taxes Management Act, 1880. She became liable to pay and has paid an assessment charged upon the premises. That assessment the defendants have covenanted to pay. Here are all the elements necessary to raise an implied request on the part of the defendants.

Ridley J. This is a claim by the plaintiff to recover money paid by her but payable, as she alleges, by the defendants under a covenant by them in a lease between the parties to pay "all rates taxes duties assessments charges impositions and outgoings whatsoever of an annual nature . . . . imposed or charged on the premises or the owner or occupier in respect thereof." The charge in question was inhabited house duty in respect of No. 67, Curzon Street. The county court judge said that in his opinion the defendants were entitled to judgment because they only agreed to pay the duty when it was legally payable; before it was legally payable by them a demand had to be made upon them; no such demand ever was made upon them and therefore they were never liable to pay; and the plaintiff, having paid a duty which never was due, has made a merely voluntary payment in respect of which she cannot recover from the defendants. In my view that judgment cannot be supported. It overlooks the nature of inhabited house duty. The House Tax Act, 1803, is still the governing statute. Sect. 10 of that Act enacts that every dwelling-house "by the Act charged" with the window tax "shall also be brought into charge in like manner according to the full and just yearly rent . . . ." By r. 1 of Sched. B to that Act the duty is "to be charged annually on the occupier or occupiers for the time being" of the dwelling-house. The process is to charge the occupier, but the charge is on the house. In the present case the plaintiff, who was the owner but not the occupier of the house, was nevertheless assessed as the occupier. She omitted to appeal from this assessment, and so by s. 56, sub-s. 6, of the Taxes Management Act, 1880, the assessment became binding upon her. The authorities are in favour of the view that when the assessment is made on the occupier the duty is charged on the house. In *Juson* v. *Dixon* (1) a collector of assessed taxes distrained the goods of a stranger upon premises subject to window tax which was unpaid. The House Tax Act, 1808, which imposed the window tax and inhabited house duty in terms similar in all material respects, gave the collector the powers contained in an Act of 43 Geo. 3, c. 99. Sect. 33 of that Act empowered collectors "to distrain upon the messuages, lands, tenements, and premises charged with any sum or sums of money." It was held that the premises were charged with the tax. It follows that they were charged with inhabited house duty. That case was followed in *MacGregor* v. *Clamp & Son* (2), where income tax under Sched. A to the Income Tax Act, 1842, was held to be a charge on the lands and premises in respect of which it is assessed, and it was admitted by counsel that in this respect inhabited house duty stands on the same footing. This duty was in my opinion charged upon the premises within the meaning of the lessees' covenant. The defendants covenanted to pay it. The plaintiff having been assessed was liable to pay it, and having paid it she is entitled to recover the amount from the defendants. The appeal must therefore be allowed.

---

(1) [1908] 2 Ch. 515.

Bankes J. I am of the same opinion. The foundation of this case is s. 10 of the House Tax Act, 1803, which enacts that

---

(1) 1 M. & S. 601.

(2) [1914] 1 K. B. 288.

1914

EASTWOOD
v.
McNAB.

Bankes J.

every dwelling-house shall be brought into charge in respect of this duty. The machinery for bringing the house into charge consists of the provisions directing that the occupier shall be assessed and that the assessment shall be made in respect of the premises, that the name of the occupier must be inserted in the assessment, and that notice is to be given to the person charged. If he does not take advantage of his right of appeal, the assessment is binding. When the assessment has become binding, two results follow—first, the person whose name appears as the occupier is bound by the assessment, and secondly, the premises in respect of which the assessment is made are charged with the payment. The House Tax Act, 1803, speaks of the premises being brought into charge; the Taxes Management Act, 1880, s. 56, mentions an assessment charging the properties and persons contained therein. The schedule to the Act of 1851 contains the words "every inhabited dwelling-house with the household and other offices therewith occupied and charged." The two cases referred to of *Juson* v. *Dixon* (1) and *MacGregor* v. *Clamp & Son* (2) are also authorities that in one sense at all events inhabited house duty is charged upon the premises in respect of which it is imposed. It may be that the word "charged" is used in a special sense in these statutes, but it must be taken that, when the parties to a covenant use the words "charged on the premises," the meaning of "charged" includes the sense in which the word is used in the statutes. Therefore the premises occupied by the defendants were charged during the time in question and in my view the words of the covenant cover the tax. Mr. Bray contended that even if this be so the plaintiff cannot recover because she is suing upon an implied promise, and in order to establish such a promise she must shew that she was legally compellable to pay the duty, since a voluntary payment will not support an implied promise to repay. No doubt the plaintiff having gone out of occupation might have appealed successfully against the assessment; but in fact she did not appeal, and therefore in every year in which she was assessed she was personally liable. The premises were charged as I have said. She has been obliged to pay what the defendants covenanted to pay and therefore she is entitled to recover. The appeal must therefore be allowed.

---

(1) 1 M. & S. 601.

(2) [1914] 1 K. B. 288.

Appeal allowed.

Solicitors for appellant: *Bell, Brodrick & Gray.*
Solicitors for defendant McNab: *St. Barbe, Sladen & Wing.*
Solicitors for defendant Adney: *Crosse & Sons.*

W. H. G.

1914
Jan. 22.

ABRAHAMS *v.* DIMMOCK.

Money-lender—Transaction harsh and unconscionable—Excessive Interest—Questions of Law or of Fact—Money-lenders Act, 1900 (63 & 64 *Vict.* c. 51), s. 1.

By s. 1, sub-s. 1, of the Money-lenders Act, 1900, where proceedings are taken in any Court by a money-lender for the recovery of any money lent or the enforcement of any agreement or security made or taken in respect of money lent, and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, or other charges are excessive, and that, in either case, the transaction is harsh and unconscionable, the Court may reopen the transaction and take an account between the parties and relieve the party sued as therein mentioned:—

Held, that the questions whether the interest is excessive and whether the transaction is harsh and unconscionable are not questions for a jury, but are for the judge.

Appeal from the county court of Bedfordshire holden at Luton.

The plaintiff, a registered money-lender, brought an action in the county court to recover 56*l.* 5*s.* on a promissory note made by the defendant and given by him to the plaintiff as security for money lent by the plaintiff to the defendant and interest thereon. The defendant claimed under s. 1 of the Money-lenders Act, 1900 (1), to reopen the transaction upon the ground that the

---

(1) Money-lenders Act, 1900 (63 & 64 Vict. c. 51), s. 1:

"(1.) Where proceedings are taken in any Court by a money-lender for the recovery of any money lent after the commencement of this Act, or interest charged was excessive and that the transaction itself was harsh and unconscionable. The action was tried before the county court judge and a jury. The judge left to the jury the questions whether the interest was excessive and whether the transaction was harsh and unconscionable. The jury found that the interest was excessive; that 50 per cent. would have been a reasonable rate of interest; and that the transaction was harsh and unconscionable. The county court judge thereupon reopened the transaction in question and a number of previous dealings between the parties, and, by taking the account between them on a principle which the Court held to be erroneous, found a balance in favour of the defendant, for whom he entered judgment for the amount so found.

The plaintiff appealed.

J. B. Matthews, K.C., and *J. F. Eales*, for the appellant. The county court judge was wrong in leaving to the jury the questions whether the interest was excessive and whether the transaction was harsh and unconscionable. By s. 1 of the Money-lenders Act, 1900, those questions are for "the Court," and it is clear

---

the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a Court of Equity would give relief, the Court may reopen the transaction, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, reopen any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest and charges, as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the money-lender, and if the money-lender has parted with the security may order him to indemnify the borrower or other person sued."

from the construction of the section that "the Court" means "the judge." "The Court" may have to be satisfied that the transaction in question is one in which a Court of Equity would give relief. That is hardly a question for a jury. "The Court" has to take the account between the parties and may reopen any account already taken and relieve the person sued from payment of any sum in excess of the sum "adjudged by the Court" to be fairly due, as the Court may "adjudge to be reasonable." It is not the function of a jury to adjudge. If there be any facts in dispute, such as the position or prospects of a borrower, those matters may be for a jury to decide as a step to the conclusion which is for the judge. The relation between judge and jury in this case is analogous to their relation in a case of false imprisonment or malicious prosecution where the question of reasonable and probable cause is for the judge after the facts in dispute have been found by a jury. The question whether a covenant in restraint of trade is reasonable or not furnishes another analogy: *Dowden & Pook* v. *Pook.* (1)

Lort Williams, for the defendant. It has twice been decided that the questions whether interest is excessive and whether a transaction is unconscionable are questions for the jury; first by Bucknill J. in *Burton* v. *Companies Registration Agency* (2), and secondly by Ridley J. in *Samuel* v. *Pazolt.* (3) The first-named case went to the Court of Appeal upon another point. The decision of Bucknill J. upon this point was not impugned.

Ridley J. In this case there must be a new trial. Two points were taken before the county court judge; first, whether it was for the judge or the jury to determine whether in a given case interest on a loan is excessive and the transaction itself is harsh and unconscionable within the meaning of s. 1 of the Money-lenders Act; secondly, on what basis the account ought to be taken between the borrower and the lender.

As to the first point it is true that in the case of *Burton* v. *Companies Registration Agency* (2) Bucknill J. left to the jury the question whether the interest charged in that case was excessive

(1) [1904] 1 K. B. 45.
(2) (1906) 23 Times L. R. 151.
(3) (1907) 23 Times L. R. 622.

and the transaction harsh and unconscionable, and that the course taken by Bucknill J. in that case was followed by me in *Samuel* v. *Pazolt*. (1) The first-named case went to the Court of Appeal (2), but their decision turned upon another question and no opinion was expressed upon this point. There is no other express authority. Allusion has been made to the province of the judge and jury in trying the issue of reasonable and probable cause in an action of false imprisonment or malicious prosecution; or in deciding the question of the reasonableness of a covenant in restraint of trade; cases which are said to present issues analogous to those raised under s. 1 of the Money-lenders Act, 1900. It is safer to decide the questions before us upon the construction of the Act. This case was left by the judge to the jury for them to find whether on a consideration of the whole case they thought the interest was excessive and the transaction harsh and unconscionable. The jury decided that the interest was excessive and that the transaction was harsh and unconscionable, adding that in their view the answer to the first question covered the second. Thereupon an account was ordered and taken. There being some doubt as to the exact order which the judge had made the parties went before him. He expressed disapproval of the account as taken and took the account which is before us. It is argued, and I think rightly, that the judge has taken the account on the wrong basis, namely, by appropriating all repayments made to principal until the amount repaid equals the principal sum lent, and then, and not till then, applying repayments to interest.

In my opinion both the questions whether the interest is excessive and whether the transaction is harsh and unconscionable ought to be decided by the judge and not by the jury. Sect. 1, sub-s. 1, of the Act, which authorizes the reopening of transactions between a borrower and a money-lender, provides that where a money-lender takes proceedings for the recovery of money lent and there is evidence "which satisfies the Court" that the interest is excessive and the transaction harsh and unconscionable, "the Court" may reopen the transaction and may relieve the person sued from payment of any sum in excess of the sum "adjudged by the Court" to be fairly due as "the Court" having regard to all the circumstances "may adjudge to be reasonable." "The Court" in these instances must mean the judge. The judge and not the jury is to adjudge what is reasonable and to reopen the transaction, and it is therefore the judge who is to decide whether the interest is excessive and the transaction unconscionable. The learned authors of Matthews and Spear on the Money-lenders Act, 1900, suggest at pp. 82 et seq. that, while the harshness of the transaction is for the judge, the excess of the interest may be for the jury. I do not assent to that suggestion. In my view the two questions are in the same category. The Act says that the Court may reopen the transaction where "there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable." All these questions are for the judge. It is impossible to say that the fact that the interest is excessive is merely one of the facts to be taken into account by the judge in considering the question whether the transaction is harsh and unconscionable. The question of the interest is not merely ancillary. It is in itself a principal question. I think that this is to be gathered from the decision of Lord Macnaghten in *Samuel* v. *Newbold* (1), the case which settled the law which had up to then been in doubt. "It seems to me," said his Lordship (2), "there are two cases contemplated by the Act: one where the interest is excessive and the transaction harsh and unconscionable, the other where the interest is excessive and the transaction is such that, without the necessity of proving the transaction to be harsh and unconscionable—without going into that question at all—a Court of Equity would give relief. It seems to me that those two cases are meant to be distinct. I think that is the grammatical construction of the language used. I think it is shewn by the introduction of the word 'is' in the second line of the sentence; and I think the circumstance that the second alternative is excluded in the application of the Act to

---

(1) 23 Times L. R. 622.

(2) 23 Times L. R. 337.

---

(1) [1906] A. C. 461.

2) Ibid. at p. 469.

Scotland points in the same direction." No doubt questions of fact may arise on the way to the decision of the principal questions, for example, as to the position, age, circumstances, and prospects of the borrower. If such questions are in dispute the decision of them is for the jury; but the main questions whether the interest or charges are excessive and whether the transaction is harsh and unconscionable, these are for the judge and not for the jury. For these reasons there must in my opinion be a new trial.

Bankes J. I am of the same opinion. I think that the county court judge took the account upon the wrong basis. This point was raised in the Court below and is open to us to decide on appeal.

The other point raises an important question. The point raised here is whether upon the construction of s. 1 of the Money-lenders Act, 1900, the questions whether the rate of interest is excessive and whether the transaction is harsh and unconscionable are in themselves questions of fact or are questions of law depending upon facts to be found, in case of dispute, by a jury. In my opinion they are questions of law, and I come to that conclusion upon a consideration of the language of s. 1. In order to reopen a transaction "the Court" has to be satisfied that the interest charged is excessive, and so on. There is no definition in the Act of the expression "the Court"; therefore we must construe the expression by reference to the language of the section. The important words are those which give "the Court" power to reopen the transaction. "The Court" there must mean "the judge." The Legislature having imposed upon the judge the duty and responsibility of reopening the transaction lays upon him the duty of saying whether or not the conditions precedent to the exercise of his jurisdiction have been satisfied, namely, whether the interest or charges are excessive and whether the transaction is harsh and unconscionable or otherwise such that a Court of Equity would give relief. "The Court" has to decide this, and those words must have the same meaning in the earlier part of the section as they have in that part where the Court is empowered to reopen the transaction. Thus the statute lays upon the judge the duty of reopening the transaction; but the plaintiff has a right to the verdict of a jury on any fact in dispute and on which the question of law arises for decision. It is true that this conclusion is not in accordance with the views of Bucknill J. in *Burton* v. *Companies Registration Agency* (1) and of Ridley J. in *Samuel* v. *Pazolt.* (2) But in the present case there has been more opportunity for argument and consideration; we are not in this Court bound by the earlier decisions and must give effect to our view if on further consideration we come, as we have come, to a contrary conclusion. There must therefore be a new trial.

Appeal allowed.

Solicitors for appellant; *Windebank & Co.*
Solicitor for respondent: *W. Bloomer, Luton.*

W. H. G.

1914
Feb. 25.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* LYDFORD.

Criminal Law—Sentence—Child—Conviction for Larceny—Power to order Child to be whipped—Officer to administer Whipping—Larceny Act, 1861 (24 *&* 25 *Vict. c.* 96), *s.* 4—*Children Act,* 1908 (8 *Edw.* 7, *c.* 67), *ss.* 102, 106, 131.

The provision of s. 4 of the Larceny Act, 1861, by which, in the case of a male person under the age of sixteen years who has been convicted of simple larceny, the punishment of whipping may be superadded to a sentence of imprisonment or penal servitude, has not been impliedly repealed by the Children Act, 1908, under which a child—that is a person under the age of fourteen years—cannot be sentenced to imprisonment or penal servitude, but can be sentenced to detention in a place of detention. Where, therefore, a male child has been sentenced to detention in a place of detention he may also be ordered to be whipped.

As in the Children Act, 1908, there is no person specifically charged with the duty of administering the punishment of whipping in the case of a child convicted on indictment and ordered to be whipped and sentenced to detention in a place of detention, the duty devolves upon the sheriff as the officer who has the general duty of executing the orders of Courts of justice. The sheriff may, however, depute the performance of this duty to a proper person.

---

(1) 23 Times L. R. 151.

(2) 23 Times L. R. 622.

CASE stated by Scrutton J. for the opinion of the Court.

At the assizes for the county of Hereford, Ernest William Lydford, aged thirteen, pleaded guilty, on February 9, 1914, to the larceny of certain postal orders. He was sentenced to be detained in a place of detention for two months and to receive twelve strokes with the birch rod, and the operation of the sentence of whipping was stayed pending the decision in this case.

The questions for the opinion of the Court were: (*a*) whether, having regard to the effect of s. 102, sub-s. 1, of the Children Act, 1908, on s. 4 of the Larceny Act, 1861, the judge had power to sentence the appellant to whipping under the latter or any other statute; (*b*) if so, whose duty it was to administer such whipping, or whether the judge had power to order any one to administer such whipping.

F. W. Sherwood, for the appellant. The first question in this case turns upon the effect on s. 4 of the Larceny Act, 1861 (1), of s. 102, sub-s. 1, and other sections of the Children Act, 1908. (2)

---

(1) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 4: "Whosoever shall be convicted of simple larceny, or of any felony hereby made punishable like simple larceny, shall . . . . be liable, at the discretion of the Court, to be kept in penal servitude . . . . or to be imprisoned, ... and, if a male under the age of sixteen years, with or without whipping."

(2) Children Act, 1908 (8 Edw. 7, c. 67), s. 102, sub-s. 1: "A child shall not be sentenced to imprisonment or penal servitude for any offence . . . ."

Sect. 106: "Where a child or young person is convicted of an offence punishable, in the case of an adult, with penal servitude or imprisonment . . . . the Court may, in lieu of sentencing him to imprisonment . . . . order that he be committed to custody in a place of detention provided under this Part of this Act and named in the order for such term as may be specified in the order, not exceeding the term for which he might, but for this Part of this Act, be sentenced to imprisonment or committed to prison, nor in any case exceeding one month."

Sect. 107: "Where a child or young person charged with any offence is tried by any Court, and the Court is satisfied of his guilt, the Court shall take into consideration the manner in which, under the provisions of this or any other Act enabling the Court to deal with the

1914

REX
v.
LYDFORD.

The appellant being under fourteen years of age is a "child" within the meaning of the Children Act, 1908, and s. 102, sub-s. 1, says that a child shall not be sentenced to imprisonment or penal servitude. By s. 4 of the Larceny Act, 1861, a male person under the age of sixteen years convicted of larceny may be sentenced to imprisonment with or without whipping. Whipping could not under that section be ordered unless the offender was sentenced to imprisonment or penal servitude, and

---

case, the case should be dealt with, namely, whether—

"(*a*) by dismissing the charge; or

"(*b*) by discharging the offender on his entering into a recognizance; or

"(*c*) by so discharging the offender and placing him under the supervision of a probation officer; or

"(*d*) by committing the offender to the care of a relative or other fit person; or

. . . . .

"(*g*) by ordering the offender to be whipped; or

. . . . .

"(*k*) by committing the offender to custody in a place of detention provided under this Part of this Act; or

. . . . .

"(*m*) by dealing with the case in any other manner in which it may be legally dealt with:

"Provided that nothing in this section shall be construed as authorising the Court to deal with any case in any manner in which it could not deal with the case apart from this section."

Sect. 108, sub-s. 1, imposes the duty on police authorities to provide places of detention, and sub-s. 4 enables those responsible for the management of any institution other than a prison, whether supported out of public funds or by voluntary contributions, to agree with the police authority for the use of the institution as a place of detention. Sub-s. 5 requires places of detention to be registered, and by sub-s. 7 the registered occupier of a place of detention is made responsible for the custody of the children and young persons detained in that place.

Sect. 109, sub-s. 1: "The order or judgment in pursuance of which a child or young person is committed to custody in a place of detention provided under this Part of this Act shall be delivered with the child or young person to the person in charge of the place of detention and shall be a sufficient authority for his detention in that place in accordance with the tenour thereof."

Sub-s. 2: "A child or young person whilst so detained and whilst being conveyed to and from the place of detention shall be deemed to be in legal custody, and if he escapes may be apprehended without warrant and brought back to the place of detention in which he was detained."

Sect. 131: "For the purposes of this Act unless the context otherwise requires—

"The expression 'child' means a person under the age of fourteen years . . . ."

as by s. 102, sub-s. 1, of the Children Act, 1908, a child can no longer be sentenced to imprisonment or penal servitude, it follows that the punishment of whipping which might previously have been conjoined with such a sentence cannot now be ordered.

[LORD READING C.J. It is clearly contemplated by the Children Act, 1908, that a child convicted, as this appellant was, should be detained. He is not detained in a prison, but he is nevertheless kept in custody.]

The Children Act, 1908, has abolished the sentence of imprisonment on a child and has set up a new institution in which he may be detained,—a place of detention—and there is nothing to preserve the power previously existing to direct a child to be whipped. Whipping is mentioned in s. 107 as one method of dealing with a child found guilty of an offence, but that is accounted for by the fact that under s. 10 of the Summary Jurisdiction Act, 1879, justices may direct a male child to be whipped by a constable in the presence of a police official of higher rank, and this either in addition to or instead of any other punishment. Sect. 107 merely enumerates the different methods of dealing with a child or a young person and does not enable the Court to order punishment by whipping unless there is specific power under some other Act enabling such an order to be made.

As to the second question, no one is indicated in the Children Act, 1908, or in any other Act, to administer the punishment of whipping in the case of a child convicted on indictment.

[CHANNELL J. The practice till 1908 was that the punishment was administered in prison by a prison official.]

That practice is no longer available as a child cannot now be sent to prison. In Denman's Digest relating to Indictable Offences the omission in the Children Act, 1908, to provide who is to administer the punishment of whipping is pointed out, and it is said (p. 108) that "as neither a judge nor a Court of quarter sessions has power to order any one other than a prison warder to inflict whipping, nor has power to order a 'child' to be imprisoned, a 'child,' at any rate when convicted on indictment, can never be ordered to suffer that punishment."

In any view the sentence of two months' detention is wrong, for by s. 106 of the Children Act, 1908, detention in the case of a child cannot exceed one month.

H. G. Farrant, for the Crown. The only effect of the provisions of the Children Act, 1908, on s. 4 of the Larceny Act, 1861, has been to substitute for imprisonment or penal servitude detention in a place of detention; there has been no further alteration of the effect of s. 4 of the Larceny Act, 1861. Punishment by whipping may still be imposed. This is borne out by the provisions of ss. 106 and 107 of the Act of 1908.

[He was stopped on this point.]

As to the second question stated for the opinion of the Court, it is the duty of the person in charge of the house of detention to administer the whipping ordered by the Court. Previously this duty was carried out by a prison official, and it was never necessary to name the actual person who should inflict the punishment: see s. 119 of the Larceny Act, 1861, which merely requires the number of strokes and the instrument with which they are to be inflicted to be specified in the sentence. If the duty of administering the whipping does not fall upon the person in charge of the place of detention where the child is ordered to be detained, this duty must fall upon the sheriff as the officer charged with the general duty of executing the orders of the Court.

F. W. Sherwood in reply. There is nothing in the Children Act, 1908, to shew that the duty of administering the punishment of whipping is to be carried out by the person in charge of the place of detention. Sect. 109, sub-s. 1, of the Act merely gives him power to detain the child.

[LORD READING C.J. If this duty falls upon the sheriff as the proper officer to carry out the orders of Courts of justice, he would have power to delegate his duty in this matter. If that is so, is there any objection to his delegating his duty to the person in charge of the place of detention, assuming him to be a proper person?]

The duties of the sheriff are now contained in the Sheriffs Act, 1887, and there is nothing in that statute imposing this duty upon the sheriff. Moreover, in view of the inveterate practice by which the punishment of whipping has been inflicted by the prison authorities, reliance cannot now be placed upon the suggested common law powers and duties of the sheriff.

The judgment of the COURT (Lord Reading C.J., Darling and Channell JJ.) was delivered by

LORD READING C.J. This appeal comes before us on a case stated by Scrutton J., before whom the appellant, a lad of thirteen years of age, pleaded guilty at the winter assizes for the county of Hereford to the larceny of certain postal orders. Scrutton J. sentenced the appellant to be detained for two months and to receive twelve strokes with the birch rod, the portion of the sentence as to whipping being stayed pending the decision of this appeal. The case states for the opinion of this Court two questions, namely, (*a*) whether the judge had power to order the appellant to be whipped, and (*b*) if so, whose duty it is to administer the whipping, or whether the judge had power to direct any one to administer the whipping.

To clear out of the way one small matter, the sentence of two months' detention imposed upon the appellant cannot stand, inasmuch as by s. 106 of the Children Act, 1908, the sentence of detention imposed upon a child or young person cannot exceed one month. The sentence therefore must be corrected in that respect.

The first question which arises is whether the appellant could be sentenced to be whipped, and that depends upon the view we take of the effect of the Children Act, 1908, upon the Larceny Act, 1861. Under s. 4 of the Larceny Act, 1861, power was given to sentence any male person under the age of sixteen who has been convicted of simple larceny to imprisonment with or without whipping. By s. 102, sub-s. 1, of the Children Act, 1908, it is provided that "a child shall not be sentenced to imprisonment or penal servitude for any offence." By the same Act power is given to order the detention of a child or young person. It has been argued by Mr. Sherwood on behalf of the appellant that inasmuch as s. 102, sub-s. 1, of the Children Act, 1908, has enacted that a child shall not be sentenced to imprisonment or penal servitude, and as to that extent the provisions of s. 4 of the

Larceny Act, 1861, have been abrogated or repealed, it follows that no sentence of whipping can now be imposed upon a child because under the Children Act, 1908, there is no express provision empowering the making of such an order. The argument is that, inasmuch as there has been a repeal by implication of s. 4 of the Larceny Act, 1861, so far as regards imprisonment and penal servitude, there must also be by implication a repeal of the power to inflict whipping. The first difficulty in Mr. Sherwood's way is that the Children Act, 1908, does not say that the provision as to whipping in s. 4 of the Larceny Act, 1861, is repealed; we are asked to imply such a repeal, but when a particular statute is dealing with the power given under an earlier statute to impose a sentence of imprisonment and whipping and the later statute says that imprisonment shall not be imposed and, without referring to whipping, substitutes a different form of detention for that which previously had prevailed, we cannot imply a repeal of the power to order whipping. The term "imprisonment" in these penal statutes has a well-known definite meaning; it means detention in gaol. A sentence of imprisonment of that kind can no longer be imposed upon a child since the Children Act, 1908. The detention which may be ordered under that Act is, nevertheless, a complete restraint of liberty which is really imprisonment, and although it is quite true that the term "imprisonment" as used in these penal statutes does convey the special meaning I have mentioned, the detention in a place of detention involves imprisonment. As we read the Children Act, 1908, it merely substitutes a sentence of detention under prescribed conditions for the sentence of imprisonment which previously could have been imposed. It remains that a sentence of whipping can still be ordered. The judge therefore had power to order the appellant to be whipped, and the first question must be answered in the affirmative.

We come now to the second and more difficult question. When under the Larceny Act, 1861, a person was sentenced to be imprisoned and to be whipped, it devolved upon the governor of the gaol to see that the whipping was administered. The powers under which this was done do not apply to places of detention provided under the Children Act, 1908. Without going through the provisions of that Act in detail it is sufficient to say that s. 106 amounts in our opinion to the substitution of the custody of a child in a place of detention for custody in prison, and ss. 108 and 109 provide for the conduct and the registration of those places of detention. Under s. 108, sub-s. 4, the places of detention may be public institutions supported out of public funds or by voluntary contributions, and the persons at the head of these institutions are under very different obligations from those of the governor of a gaol. Nevertheless, if the Court has power to make an order there must be some one whose duty it is to carry it out, and we must come to the conclusion that this duty falls upon the sheriff as the officer charged with the carrying out of the orders of Courts of justice unless we find some provision which expressly or by necessary implication prevents that duty being cast upon him. In our view the Sheriffs Act, 1887, which is an Act to consolidate the law in reference to the office of sheriff in England, is by no means exhaustive of the duties and powers of the sheriff. The sheriff would be the person entrusted in the ordinary course, and apart from any statutory enactment, with the duty of carrying out the order of the Court. It is not necessary that a person should be named to carry it out. Under the Larceny Act, 1861, all that it was obligatory on the Court to do was to state the number of strokes and the instrument with which the punishment was to be inflicted. It was suggested that s. 109, sub-s. 1, of the Children Act, 1908, conferred this power upon the person in charge of the place of detention. We cannot read the sub-section in that way. The sub-section was merely intended to be an authority to the person in charge of the place of detention for detaining a child in custody. In these circumstances we come to the conclusion that this duty devolves upon the sheriff, who may appoint a substitute. There is nothing to prevent him appointing in a proper case, and when he has satisfied himself that the punishment will be properly carried out, some suitable person, for example the person at the head of the place of detention, or a police officer. It is by a police officer that the punishment of whipping is carried out under s. 10 of the Summary Jurisdiction Act, 1879, and that might form a useful precedent for the sheriff to follow. We therefore answer the second question by saying that it is the duty of the sheriff or such person as he may designate to administer the whipping. The appeal will be dismissed except that the sentence of two months' detention must be reduced to one month.

Appeal dismissed: Sentence reduced.

Solicitor for appellant: *Registrar of Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

J. S. H.

1914
Feb. 16.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* HILL.

THE KING *v.* CHURCHMAN.

Criminal Law—Living on Earnings of Prostitution—Indictment—Jurisdiction of Quarter Sessions to try—Charge in respect of one specified Day only—Validity of Indictment—Vagrancy Act, 1898 (61 *&* 62 *Vict. c.* 39), *s.* 1—*Criminal Law Amendment Act,* 1912 (2 *&* 3 *Geo.* 5, *c.* 20), *s.* 7.

An indictment, under sub-s. 5 of s. 7 of the Criminal Law Amendment Act, 1912, for the offence of knowingly living on the earnings of prostitution, can be tried by a Court of quarter sessions.

In an indictment for this offence a person can properly be charged with having committed the offence on one specified day only.

Appeals from convictions at the Portsmouth Quarter Sessions.

Each of the appellants was committed for trial from petty sessions upon a charge of living on the earnings of prostitution, having been previously convicted of that offence. Hill was indicted for that he "on the 21st day of November, 1913, being a male person, did unlawfully and knowingly live in part on the earnings of" a prostitute. Churchman was indicted for that he "on the 8th day of November, 1913, and on divers days and times thereafter between that day and the 22nd day of November, 1913, being a male person did unlawfully and knowingly live in part on the earnings of the prostitution of a certain female named . . . ." (1)

---

(1) The Vagrancy Act, 1824 (5 Geo. 4, c. 83):— Sect. 5: ". . . . Every person committing any offence against this Act

In both cases the objection was taken at quarter sessions that there was no jurisdiction to try the indictment. In the case of Hill the further objections were taken, that the indictment was bad because it alleged that the offence was committed on one day only, and that evidence was not admissible to shew that the accused was living on the earnings of prostitution upon any day except that which was alleged in the indictment. The recorder overruled all the objections, and the appellants were convicted.

---

which shall subject him or her to be dealt with as a rogue and vagabond, such person having been at some former time adjudged so to be and duly convicted thereof, ... shall be deemed an incorrigible rogue within the true intent and meaning of this Act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the House of Correction, there to remain until the next general or quarter sessions of the peace; and every such offender who shall be so committed to the House of Correction, shall be there kept to hard labour during the period of his or her imprisonment."

Sect. 10: "When any incorrigible rogue shall have been committed to the House of Correction, there to remain until the next general or quarter sessions, it shall be lawful for the justices of the peace there assembled to examine into the circumstances of the case, and to order, if they think fit, that such offender be further imprisoned in the House of Correction, and be there kept to hard labour for any time not exceeding one year from the time of making such order, and to order further, if they think fit, that such offender (not being a female) be punished by whipping . . . ."

The Vagrancy Act, 1898 (61 & 62 Vict. c. 39):—

Sect. 1: "Every male person who—

"(*a*) knowingly lives wholly or in part on the earnings of prostitution, ...

shall be deemed a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and may be dealt with accordingly."

The Criminal Law Amendment Act, 1912 (2 & 3 Geo. 5, c. 20):—

Sect. 7, sub-s. 2: "The period of imprisonment with hard labour which may be awarded to a person deemed to be a rogue and vagabond under the Vagrancy Act, 1898, ... shall be increased to six months, but such person shall not be liable to be dealt with as an incorrigible rogue within the meaning of the Vagrancy Act, 1824."

Sub-s. 5: "A person charged with an offence under the Vagrancy Act, 1898, may, instead of being proceeded against in England as a rogue and vagabond, be proceeded against on indictment, and on conviction on indictment shall be liable to imprisonment, with or without hard labour, for a term not exceeding two years . . . ."

Sect. 9: ". . . . The Criminal Law Amendment Act, 1885, and this Act may be cited together as the Criminal Law Amendment Acts, 1885 to 1912."

The recorder certified that each case was fit for an appeal to the Court of Criminal Appeal.

John Harris, for the appellants. Under s. 1 of the Criminal Law Amendment Act, 1898, a person committing this offence is to be dealt with as a rogue and vagabond under the Vagrancy Act, 1824. Under the Act of 1824 a rogue and vagabond was to be dealt with summarily, but if it appeared that he had been previously convicted as such the justices might commit him to quarter sessions as an "incorrigible rogue" (s. 5), there to be punished (s. 10). That was the only jurisdiction of quarter sessions; a rogue and vagabond could only come before quarter sessions when committed, as an incorrigible rogue, for sentence of imprisonment with hard labour and with or without whipping. Now the Criminal Law Amendment Act, 1912, by sub-s. 2 of s. 7, has taken away the power of quarter sessions to deal with such an offender as an incorrigible rogue, and sub-s. 5 provides that he may be proceeded against on indictment. The former jurisdiction of quarter sessions being expressly taken away, and no express power being given to try an indictment for this offence, the general jurisdiction of quarter sessions to try indictments is ousted. Further, s. 17 of the Criminal Law Amendment Act, 1885, provides that no indictment under the provisions of that Act shall be tried by quarter sessions, and the effect of s. 9 of the Act of 1912 is that that provision must be applied to the later Act.

In the case of Hill the indictment discloses no offence against the Act of 1898. The offence of "living on the earnings of prostitution" denotes a mode of living, the continuance of acts or conduct of a certain kind over some substantial period of time. The offence cannot be committed upon one day only, and cannot be proved by acts or conduct committed upon a single day.

H. C. Fenton, for the Crown in the case of Churchman.

H. du Parcq, for the Crown in the case of Hill.

The judgment of the Court (Lord Reading C.J., Bankes and Avory JJ.) was delivered by

Bankes J. In these cases several points have been raised. The first is that the Court of quarter sessions had no jurisdiction to try the indictments. Both prisoners were tried for the same offence, that of living on the earnings of prostitution. The Vagrancy Act, 1898, by s. 1, provides that every male person who knowingly so acts shall be deemed a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and may be dealt with accordingly. Under the Act of 1898 the method of dealing with these cases was by summary procedure before justices, who had power to commit an offender who had been previously convicted as a rogue and vagabond to quarter sessions for punishment. Then came the Criminal Law Amendment Act, 1912, which by sub-s. 2 of s. 7 provided that the period of imprisonment for a rogue and vagabond under the Act of 1898 should be increased to six months, but that he should not be liable to be dealt with as an incorrigible rogue within the Act of 1824; and sub-s. 5 of s. 7 deals with substituted procedure, and provides that a person charged with an offence under the Act of 1898 may, instead of being proceeded against as a rogue and vagabond, be proceeded against on indictment.

It has been argued that those provisions impliedly oust the jurisdiction of quarter sessions. We do not agree with that argument. The general rule as to the jurisdiction of quarter sessions is that all indictments can be tried there, except for treason, murder, or capital felony or felony punishable by penal servitude for life, or unless jurisdiction has been expressly excluded by any statute. Here the Act of 1912 substitutes proceedings by indictment for summary proceedings, and there is nothing in the statute to exclude the jurisdiction of quarter sessions. The other argument is that by reason of the provisions of s. 17 of the Criminal Law Amendment Act, 1885, which provides that no indictment under the provisions of that Act shall be tried by quarter sessions, and of s. 9 of the Act of 1912, an indictment for this offence cannot be tried by quarter sessions. That argument, in our opinion, is not well founded. Sect. 9 of the Act of 1912 only provides that that Act and the Act of 1885 "may be cited together as the Criminal Law Amendment Acts, 1885 to 1912," and that does not mean that all the provisions of the one Act are to be read into the other.

A further objection was taken in the case of Hill. He was indicted for having lived on the earnings of prostitution upon one specified day only, and it was contended that the indictment was therefore bad. It was also contended that evidence was not admissible upon the indictment, as laid, of anything done on any day except the day specified. We do not agree with either contention. The indictment charging the offence in that way is perfectly good, and there is no ground for saying that evidence is not admissible to shew what the appellant's relations with the woman in question had been either before or after the day specified in the indictment, as such evidence is clearly relevant to the question whether he was or was not, on the day specified, living on the earnings of her prostitution. These appeals must therefore be dismissed.

Appeals dismissed.

Solicitor for appellants: *Registrar of Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

J. H. W.

C. A.

1914
Feb. 3, 4, 6.

[IN THE COURT OF APPEAL.]

THE KING *v.* COMMISSIONERS OF CUSTOMS AND EXCISE AND ANOTHER.

Licensing Acts—New On-Licence—Monopoly Value—Omission to fix Definite Capital Sum—Conditions—Annual Payment—Percentage of each Year's Gross Takings—Licensing Justices—Jurisdiction—Licence not granted "in accordance with" Act—Refusal of Retail Excise Licence—Statutory Duty of Commissioners—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 1; *s.* 14, *sub-s.* 1 (*a*).

Licensing justices granted a new justices' on-licence without first estimating at a definite capital sum the monopoly value as defined by s. 14, sub-s. 1 (*a*), of the Licensing (Consolidation) Act, 1910, but they attached to the grant certain conditions providing that the sum to be paid as monopoly value should be an annual sum representing a percentage of each year's gross takings from the sale of intoxicants:—

Held, that monopoly value as defined by s. 14, sub-s. 1 (*a*), is a definite lump sum to be ascertained once for all; that the justices had no jurisdiction to omit this preliminary step and to attach the above

C. A.
1914

Rex
v.
Customs
and
Excise
Commissioners.

conditions to the grant of the licence; and that the licence was not granted in accordance with the Act.

The Commissioners of Customs and Excise having refused to grant a retail excise licence to the holder of a justices' licence granted as above stated :—

Held, that in the circumstances and having regard to the statutory duty imposed on the Commissioners by s. 1 of the Act, which provides that an excise licence "shall not be granted except to a person who holds a justices' licence granted in accordance with this Act," the Commissioners were justified in their refusal.

Decision of the Divisional Court (Bray and Lush JJ., Avory J. dissenting) [1913] 3 K. B. 483 affirmed.

Appeal from an order of the Divisional Court (1) discharging a rule nisi to the Commissioners of Customs and Excise and to the collector of Customs and Excise at Sunderland in the county of Durham to shew cause why a writ of mandamus should not issue directed to them commanding them to grant to one Jenkins an excise liquor licence in respect of the Royal Hotel, Horden, in the same county.

The circumstances in which the rule nisi was granted were as follows: On March 11, 1911, Jenkins applied to the justices for the South Division of Easington Ward, in the county of Durham, for a provisional grant of a new on-licence for a public-house to be known as the Royal Hotel at Horden. The justices granted the licence, subject to the following conditions:—(1.) That the sum to be paid as monopoly value for the first year in which trading should be carried on should be at the rate of 400*l.* per annum and should be calculated from the time trading commenced until the expiration of the licensing year. (2.) (*a*) That if trading should be carried on during the whole of the first year, 5 per cent. of the actual first year's gross takings from intoxicants should be paid as monopoly value for the second year, but in the event of the sum representing such percentage being less than 400*l.* an abatement should be allowed equivalent to the difference between the sum representing such percentage and 400*l.* (*b*) That if the trading should be carried on during part only of the first year, 5 per cent. of the estimated gross takings from intoxicants for the whole of the first year should be paid as monopoly value for the second year, such estimated gross takings being calculated in proportion to the actual takings for that part of the first year during which trading should have been carried on, but in the event of the sum paid as monopoly value for such part of the first year exceeding a sum representing 5 per cent. upon the actual gross takings from intoxicants during such part of such year the holder of the licence should be entitled to an abatement equal in amount to such excess. (3.) That the holder of the licence should after the second year pay as monopoly value during each year in which the licence should remain in force a sum representing 5 per cent. of the previous year's gross takings from intoxicants. (4.) That for the purpose of calculating the above percentage the holder should keep proper books of account shewing all amounts received at or in respect of the licensed premises.

---

(1) [1913] 3 K. B. 483.

On April 7, 1911, Jenkins applied to the confirming authority for the county of Durham for confirmation of the provisional grant, and they duly confirmed it subject to the following variation of the conditions attached thereto, namely, by the substitution of 7½ for 5 per cent. of the gross takings from intoxicants as the payment of monopoly value.

On November 18, 1911, Jenkins applied to the justices for a final order which was duly made under s. 33, sub-s. 2, of the Licensing (Consolidation) Act, 1910.

Jenkins subsequently applied to the collector of Inland Revenue at Sunderland for the excise licence. The collector, acting on the instructions of the Commissioners of Customs and Excise, refused to issue an excise licence in respect of the Royal Hotel on the ground that monopoly value as defined in the Licensing (Consolidation) Act, 1910, was not capable of being measured by a percentage of takings, and that the justices' licence had not been granted in accordance with, and did not comply with the requirements of, s. 14 of the Act (1), inasmuch as the justices

---

(1) Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 14: "(1.) The licensing justices, on the grant of a new justices' on-licence, may attach to the grant of the licence such conditions, both as to the payments to be made and the tenure of the licence and as to any other matters, as they think proper in the interests of the public; subject as follows:—

"(a) Such conditions shall in any case be attached as, having regard to proper provision had not determined the amount of the monopoly value, or of the payments to be made in respect of monopoly value, or attached to the grant of the licence the conditions required by s. 14 for securing to the public the monopoly value of the Royal Hotel.

Ryde, K.C., and *Konstam*, for the appellant. The appellant is entitled to a new on-licence subject to the conditions attached to it by the licensing justices, and the Commissioners of Customs and Excise had no jurisdiction to refuse to grant it to him. They might have appeared before the justices and opposed the application, under s. 87 of the Finance (1909-10) Act, 1910, but did not see fit to do so. They cannot now act as a court of appeal from the decision of the justices. The justices were acting judicially and decided a point within their jurisdiction. The question how the monopoly value is to be secured to the public under s. 14, sub-s. 1 (*a*), of the Licensing (Consolidation) Act, 1910, is one for the justices, and the Commissioners have no jurisdiction to say that their decision is wrong. The justices have power to state a case for the opinion of the King's Bench Division—*Rex* v. *Southampton Licensing Justices* (1)—or the Commissioners could have applied by certiorari; but now they are out of time: r. 21 of the Crown Office Rules, 1906.

Under s. 1 of the Licensing (Consolidation) Act, 1910 (2), a

---

for suitable premises and good management, the justices think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed; . . . ."

"(*b*) The amount of any payments imposed under conditions attached in pursuance of this section shall not exceed the amount thus required to secure the monopoly value."

(1) [1906] 1 K. B. 446.

(2) Licensing (Consolidation) Act, 1910, s. 1, provides: "Subject to the provisions of this Act, an excise licence under which intoxicating liquor may be sold by retail shall not be granted except to a person who holds a justices' licence granted in accordance with this Act authorising the grant of the excise licence to that person, and any excise licence granted in contravention of this section shall be void."

justices' licence is required for the grant of a retail excise licence. The scene of this dispute is a licensing district, the licensing justices are the justices acting in and for the petty sessional division, and the confirming authority are the quarter sessions, within s. 2, sub-s. 2. By s. 6, sub-s. 2, the powers of the confirming authority may be delegated to a committee. By s. 12 new licences have to be confirmed; and s. 13 provides for the procedure on confirmation of new licences. In this case all the proceedings have been regular and the conditions were attached to the licence on the initiative of the justices themselves.

It is submitted that the judgment appealed from is wrong in holding that "monopoly value" as defined by s. 14 can only be a definite capital sum. The justices had jurisdiction to attach these conditions to the licence. It may be that the best course would be to fix the monopoly value at a capital sum, but there is nothing in s. 14 which compels the justices to adopt that method. If in their opinion the monopoly value can be best secured to the public by the payment of an annual sum based on a percentage of the takings, they are entitled to impose that condition. The word "value" in s. 14 may be construed to mean either capital or annual value; and capital is not mentioned. The "value which the licensed premises will bear" must mean the value taking into consideration the duration of the licence. The renewal of an annual licence can be refused at any time, and if the monopoly value has been fixed at a capital sum payment of which is spread over several years, in the event of the non-renewal of the licence the monopoly value would not be secured to the public. Calculations of value under s. 14, sub-s. 1 (*a*), do not take the form of merely ascertaining the sale value of the house as licensed and unlicensed, for the question of time has to be considered. The expressions used by Lord Haldane L.C. in *Commissioners of Inland Revenue* v. *Truman, Hanbury, Buxton & Co.* (1) were relied on, but that case turned on the meaning of the proviso to s. 44 of the Finance (1909-10) Act, 1910, and his Lordship was speaking obiter. The justices had to consider all the circumstances and their decision on these particular facts was probably wise, inasmuch as the district is about to be

(1) [1913] A. C. 650.

developed as a coalfield and will witness great changes in population; they were satisfied with the licensee; and the licence was an annual licence.

[SIR SAMUEL EVANS, PRESIDENT, referred to *Rex* v. *Dodds.* (1)]

Sect. 47 of the Finance (1909-10) Act, 1910, shews that monopoly value may be paid by annual instalments, and that being so, there is no greater risk likely to attend the payment of variable, than of fixed, annual sums. The licence has to be granted each year, and if default were made in payment the justices would refuse to renew.

In the present case the quantum of trade was problematical and the number of unknown multiples was great, and the justices after careful consideration came to the conclusion that the problem could best be solved by fixing a percentage on the annual gross trade receipts. Having come to that conclusion, it is not for the local excise officer to sit as a court of appeal over the justices and disregard a licence granted by them because he thinks it is not in accordance with the Act. The proper course would have been for the Commissioners either to appear before the justices and object to the grant of a justices' licence and ask them to state a special case, or to apply for a writ of certiorari.

Here, the justices had to decide what conditions should be attached; they may have come to a wrong decision, but a wrong decision on a right question does not amount to a wrong jurisdiction so that any member of the public may disregard it. Even the High Court will not review the decision of an inferior tribunal made bona fide within its jurisdiction and with the mind of the tribunal applied to the particular question: *Rex* v. *Monmouth Justices* (2); *Reg.* v. *Blanshard* (3); *Reg.* v. *Recorder of Liverpool* (4); *Reg.* v. *Middlesex Justices* (5); and a mandamus only lies when the inferior Court has exceeded the ambit of its jurisdiction: *Rex* v. *Monmouth Justices.* (6)

In the Divisional Court this case was argued as though it were an application for a certiorari to the justices, whereas it is for a

---

(1) [1905] 2 K. B. 40.
(2) (1825) 4 B. & C. 844.
(3) (1849) 13 Q. B. 318.
(4) (1850) 20 L. J. (M.C.) 35.
(5) (1877) 2 Q. B. D. 516.
(6) (1913) 30 Times L. R. 26.

REX v. CUSTOMS AND EXCISE COMMISSIONERS.

mandamus to the excise officer, and the case of *Board of Education* v. *Rice* (1) was misapplied.

Even if the justices came to a wrong decision they have done so bona fide and with their minds applied to the particular question, and their certificate has none the less been granted in accordance with the Act—that is in exercise of their jurisdiction under the Act—and the Commissioners are not entitled to disregard it.

Sir John Simon, A.-G., and *Daldy*, for the respondents. The justices must in the first instance assess the monopoly value at a fixed sum, and they had no jurisdiction to attach the conditions in question. "It is all very well to say that it may come to the same thing, but when the magistrates are fettered by a statute which enables them only to act in a particular way, they must abide by that way": per Earl of Halsbury L.C. in *Laceby* v. *Lacon & Co.* (2)

[Cozens-Hardy M.R. We do not desire to hear you further on this point, as we are all agreed that monopoly value must be a definite estimated sum. We would like to hear you on the question of jurisdiction.]

The application for a mandamus cannot succeed unless it be shewn that it was the duty of the Commissioners to issue an excise licence. If it was not their duty, no mandamus will lie.

Granted that monopoly value must be a definite capital sum, then licensing justices cannot omit the preliminary step of fixing that sum. In the present case the justices did not fulfil that condition precedent, and if on that account the justices' licence was invalid because not granted in accordance with the Act, the Commissioners have no power to grant an excise licence. That appears clear from s. 1 of the Licensing (Consolidation) Act, 1910. It is their statutory duty to exercise their power properly and they have to see whether the justices' licence is granted in accordance with the Act. In this case the excise authorities came to the conclusion that it was not so granted. There are no available means of ascertaining the yearly amounts payable under this licence and there is no method provided by the Act for collecting them. On the face of it this licence was not in accordance

(1) [1911] A. C. 179.

(2) [1899] A. C. 222, 229.

with the Act, and therefore there was no duty on the excise officer to issue his excise licence, and no mandamus will lie.

Ryde, K.C., in reply.

Cur. adv. vult.

Feb. 6. COZENS-HARDY M.R. This appeal raises a question of general importance as to the powers of licensing justices in reference to the grant of a new on-licence under s. 14 of the Licensing (Consolidation) Act, 1910. That section enables the justices in their discretion to attach conditions, but makes some conditions obligatory.

Sect. 14, so far as material, is in the following words:—[His Lordship read sub-s. 1 (*a*) of s. 14, and continued :]

I think it is the clear duty of the justices to "estimate" as best they can the "monopoly value," that is, the difference between the value which the premises will bear when licensed and the value of the same premises if they were not licensed. This is a lump sum, to be ascertained once for all, though when so ascertained it is competent to the justices in their discretion to say how that monopoly value is to be secured to the public, and whether it is to be paid in one sum or by instalments. The language of sub-s. 1 (*a*) seems so clear as not to require assistance from any other part of the statute, but sub-s. 1 (*b*) is, in my opinion, conclusive to shew that the interpretation I have put upon sub-s. 1 (*a*) is correct. I agree with the judgment of Bray J. and Lush J. on this point, and I do not think it necessary further to elaborate the argument.

In the present case, the justices of Durham purported to grant to Jenkins a licence subject to four conditions, in which no lump sum is estimated, but "monopoly value for the first year" and for each subsequent year is to be ascertained by a percentage of gross takings in that year. I can find no warrant for such a yearly monopoly value, varying from year to year. Nor can I find any justification for imposing upon the Commissioners the task of ascertaining and testing the amount of the gross takings upon which the payments are made to depend. Armed with this licence, Jenkins applied for an excise licence. The Commissioners declined to grant it. Jenkins applied for a mandamus to compel them to grant it. A rule nisi obtained by Jenkins was discharged by the Divisional Court, Avory J. dissenting, and from that decision the present appeal is brought.

The appellant's right to an excise licence depends upon s. 1 of the Act. It is not disputed that if the justices' licence is in order, the Commissioners ought to grant the excise licence. But there are negative words. The excise licence "shall not be granted except to a person who holds a justices' licence granted in accordance with this Act." In my opinion the licence obtained by Jenkins was not in accordance with the Act, as appears on the face of the licence. And it cannot be right to order the Commissioners to grant an excise licence in the face of this express prohibition—a licence moreover which, if granted, would be void.

It has, however, been strenuously argued that the only course open to the Commissioners was either to appear before the justices and object and ask the justices to state a special case, which they were not bound to do, or to apply for a writ of certiorari. I cannot assent to this contention. The Commissioners were, in my opinion, entitled to say "the paper you bring is not on the face of it a justices' licence granted in accordance with the Act, and we are not bound to act upon it." Nothing that I have said must be taken to lend any support to the idea that local excise officers are to be alert in finding fault with the orders of justices. But we are dealing with a test case, designed to raise a very important question as to which the justices of Durham have taken a view and established a practice which the responsible advisers of the Commissioners deem wrong. This question has been most conveniently raised upon this mandamus.

In my opinion the appeal must be dismissed with costs.

Sir Samuel Evans, President. The matter of substance in controversy in these proceedings is whether a new justices' on-licence was granted by licensing justices in accordance with the Licensing (Consolidation) Act, 1910, so as to entitle the person named therein to demand the grant of an excise license for the sale of intoxicating liquors. This depends upon the construction and meaning of s. 14 of the Act. That section makes it compulsory for the justices on the grant of a new on-licence to attach to the grant such conditions as they think best adapted "for

The President.

securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed." What is the meaning of the "monopoly value" which is to be thus secured to the public? In the first place it is the difference between the two "values" described in the section. Those values ought therefore to be estimated by the justices. They must be estimated before the monopoly value can be ascertained. The monopoly value would thus be arrived at and fixed before the licence is granted; and the necessary conditions must then be attached to the grant for securing the monopoly value to the public. I think it is abundantly clear from the section that the "monopoly value" must be a definite sum fixed once for all when the licence is applied for, and before it is granted. When it has been fixed, the justices must take measures by the conditions attached to the grant to secure it to the public; and they can include in the conditions provisions for payments by instalments; but by sub-clause (*b*) of sub-s. 1 the amount of any payments imposed under the conditions shall not exceed "the amount thus required to secure the monopoly value." It follows that the monopoly value cannot be left to be ascertained or fixed either by the justices, or by anybody else, annually, or periodically; and it certainly cannot remain an indefinite sum or sums to be ascertained or fixed in the future by some one, somehow, somewhen, or somewhere. When the monopoly value has been fixed at a definite sum, and once for all, its amount, or the amounts of the payments to be made in respect of it in pursuance of any conditions under the section, is or are to be collected by the Commissioners of Customs and Excise (sub-s. 3); and they ought to know exactly what amounts to collect.

It is not necessary for me to repeat the examination of the various provisions of the Licensing Act which was so carefully made by Bray J. and Lush J. in their judgments in the Court below. With their reasons and conclusions upon this part of the case I entirely agree. Accordingly I am of opinion upon the facts of this case that the justices acted upon a wholly erroneous view of the law enacted by s. 14; and that they failed to attach

C. A.
1914

Rex v. Customs and Excise Commissioners.

The President.

the conditions which under that section were essential to the validity of their grant. It is clear that they did not estimate the "values" described in sub-s. 1 (*a*); and therefore did not ascertain the "difference" between such values, which, by the terms of the sub-section, would represent the "monopoly value"; and accordingly they did not fix such monopoly value, or attach conditions to secure it. What they did, or purported to do, was to fix a monopoly value for the first year at a fixed sum, but this fixed sum was (to state it briefly) reducible by abatement dependent upon uncertain factors in the second year. Then for the second year they fixed another monopoly value dependent upon the actual gross takings from intoxicants in the first year, if trading should be carried on during the whole of that year, or dependent upon the "estimated" gross takings if trading should only be carried on during part of the first year. Then for each year after the second year in which the licence should remain in force they fixed other monopoly values dependent upon the actual gross takings of the previous year. And they ordered that the licence holder should keep proper books of account "shewing all amounts received at or in respect of the licensed premises." How and by whom such estimated or actual gross takings were to be ascertained, and how and by whom in the case of any dispute they should be settled, is left in the clouds.

It was contended that it was an impossible or a difficult task for the justices to determine upon a monopoly value once for all at the time of the application, or before they granted the licence. I do not think it was. It is well known that licensed premises in a particular locality, whether already established, or newly licensed, have a market value. By a comparison of this value with the value of the premises unlicensed, a monopoly value can be ascertained or estimated without any difficulty. Such monopoly values have been arrived at in almost every licensing district, and in numerous cases, since the passing of the Licensing Act of 1904. But whether the problem of ascertaining the monopoly value at a definite sum once for all at the time of the application or before the licence is granted be difficult or easy, this is what the Legislature has enacted, and no other problem can be substituted for it.

The President.

For the reasons stated I am of opinion that the justices' licence in this case was not granted in accordance with the Act.

It follows from s. 1 of the Act, that an excise licence should not be granted upon the authority of that licence; and that if it were, it would be granted in contravention of s. 1 and would be void.

The point that remains is one of form only. The appellant's counsel contended that the Commissioners of Customs and Excise could not by themselves, or through their collector, set themselves up as a tribunal to decide that the justices' licence was not granted in accordance with the Act, and therefore that they had no right to refuse the excise licence.

It is obviously undesirable that the Commissioners or their collector should take upon themselves, whatever their rights may be, the responsibility of deciding whether a justices' licence is valid in law or not, where there is a reasonable doubt upon the question. In this case it could hardly be denied that a reasonable doubt existed, when one of the learned judges in the King's Bench Division in a dissenting judgment expressed his opinion that the justices' licence was valid.

But it appears that there were special and exceptional circumstances in this case which in the view of the Commissioners made it necessary for them and their collector to take the course they did, in order to have the important question of law raised in the case decided.

However this may be, the appellant's application to the King's Bench Division—and therefore on appeal to this Court—was for a writ of mandamus directed to the Commissioners and their collector to grant an excise licence on the authority of the justices' licence.

The decision of this Court is that the justices' licence was not granted in accordance with the Act. Sect. 1 of the Act in such a case enacts that the excise licence should not be granted, and if granted would be void. It is obvious, therefore, that the writ of mandamus cannot be issued; and the appeal is dismissed.

JOYCE J. I agree. The section in question requires the justices to secure to the public the difference—I am reading it shortly and leaving out immaterial words—between the value which the premises would bear in the opinion of the justices when licensed and the value of the same premises when they were not licensed. It appears to me this is the difference between two sums of money, the first being the amount to be estimated by the justices, which in the opinion of the justices is the selling or market value of the premises if and when the licence be granted and I think as soon as granted, the second being the selling or market value of the premises without any licence to be estimated similarly as at the date when the licence is granted. This difference will and must necessarily be a sum of money. They are not directed to secure the amount of the profits or benefit which the holder or successive holders of the licence when granted will actually derive from the fact of the licence being granted, they are not to fix any percentage or proportion of such profits. Without saying that the section cannot mean anything else, what I have stated seems to me to be the natural and primary meaning of the words, and it seems to me to involve the fixing at once, by estimation or opinion of the justices, of a definite amount or sum of money which is to be secured.

Now, instead of securing the difference between two estimated amounts or fixing any definite sum or estimated amount to be paid either by instalments or otherwise, they have provided for certain periodical payments or for a percentage of certain receipts, leaving it quite uncertain at the time when the licence is granted how long these payments will go on or what their aggregate sum may ultimately amount to. What is secured or purported to be secured by the conditions in this licence is not any estimated amount, but depends upon the actual profits or proportion of certain receipts to be ascertained from books which may or may not be correctly kept, or, indeed, as far as I can see, would not necessarily be kept at all.

How long is this to go on? If I understand it, what it amounts to is that it is to go on until the licence drops, which may be at the end of the first year or at the end of a number of years, and the amount secured is never fixed at all, but made to depend upon subsequent events, including in particular the conduct or management of the house varying from time to time.

For instance, if a temperance society purchased this house in the first year and suppressed the licence, the sum to be paid would be, I think, less than 400*l.*, possibly a very small sum indeed. If it went on for a great number of years it might amount to thousands of pounds. What the justices have done may be a very excellent arrangement in the opinion of many people, but is it the arrangement prescribed by the Act? I think that plainly it is not, but something totally different. Certain payments or percentages to be paid and accumulated not for any stated period but as long as the house remains licensed: that is what has been provided for, and it is left quite uncertain what the amount will be. Then when I look at the conditions imposed I see provisions about the monopoly value in one year and the monopoly value in another year and so on. I have not succeeded in finding anything in the Act to countenance the view that there is any such thing as annual monopoly value. I think there is not, and, therefore, I think it cannot be truly or properly said that the sum of those accumulated payments is the difference between the value which the premises will bear in the opinion of the justices when licensed and the value of the same premises if they were not licensed. What the justices have attempted to secure is, to my mind, a totally different thing from that which under the section they are required to secure. That being so, it appears to me that the justices have placed an erroneous construction upon the words of this section, and, therefore, I think that, plainly seeing the conditions as appearing on the licence, the licence on the face of it is not granted in accordance with the provisions of the Act. That being so, although I confess I have felt some little hesitation about this second part of the case, I think that the excise authorities were not bound to grant or confirm the licence, whatever the proper expression may be, and, consequently, I think that this appeal fails and must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Godden, Holme & Ward, for Newby Robson & Robson, Stockton-on-Tees.*

Solicitor for respondents: *W. M. Graham-Harrison.*

R. M.

1914
Feb. 24, 28.

VELAZQUEZ, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp Duty—Agreement—Sale of Business—Debts owing by Persons resident Abroad—" Property locally situate out of the United Kingdom "—Stamp Act, 1891 (54 *& 55 Vict. c.* 39), *s.* 59, *sub-s.* 1.

An agreement was made and executed in England for the sale of a business carried on at Buenos Aires in Argentina and its assets. The assets of the business included certain book debts owing by persons resident in Argentina to the vendor of the business:—

Held, that the book debts were not property "locally situate out of the United Kingdom" within the meaning of the exception in s. 59, sub-s. 1, of the Stamp Act, 1891, and that an ad valorem duty was, therefore, payable on the apportioned consideration for the sale of the book debts.

The decisions of the Court of Appeal in *Smelting Co. of Australia* v. *Inland Revenue Commissioners* [1897] 1 Q. B. 175 and *Danubian Sugar Factories* v. *Inland Revenue Commissioners* [1901] 1 K. B. 245 have not been overruled by *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine* [1901] A. C. 217.

Case stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891.

On March 7, 1913, an instrument was presented on behalf of the appellants, Velazquez, Limited, a company incorporated under the Companies (Consolidation) Act, 1908, and having its registered office at 16, Southampton Street, Bloomsbury Square, in the county of London, to the Commissioners of Inland Revenue under s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable.

The instrument in question was an agreement, and the parties thereto were Herbert Velazquez, of Evelyn House, 62, Oxford Street, in the county of London, John Nunn Huxter, of 26, Reddons Road, Beckenham, in the county of Kent, and the appellants; the parties duly executed the agreement in England on March 5 1913.

Herbert Velazquez had prior to the date of the instrument carried on business at Buenos Aires in the Republic of Argentina, and the agreement embodied in the instrument was an agreement for the sale of the business so carried on and its assets. Among the assets sold under the agreement were debts which accrued due to Herbert Velazquez in the course of carrying on the business. Of the price payable under the agreement, the portion attributable, on a due apportionment, to these debts was 8439*l*. 16*s*. 7*d*.

The appellants contended that no ad valorem conveyance duty was exigible under s. 59 of the Stamp Act, 1891, in respect of the price (namely 8439*l*. 16*s*. 7*d*.) of the said debts on the ground that the debts were within the exception in sub-s. 1 of s. 59 in favour of "property locally situate out of the United Kingdom," but the Commissioners were of opinion that the debts were not within the exception, and that the agreement was, as to such debts, within the charge imposed by s. 59; and they accordingly assessed it as liable to the same ad valorem duty as if it were an actual conveyance on sale of the debts agreed to be sold, namely, the duty of 84*l*. 10*s*., that being the duty payable under the heading "Conveyance or transfer on sale" in the First Schedule of the Stamp Act, 1891, as amended by s. 73 of the Finance (1909-10) Act, 1910, on a consideration of 8439*l*. 16*s*. 7*d*.

The question for the opinion of the Court was whether the instrument was liable to ad valorem conveyance duty on 8439*l*. 16*s*. 7*d*.

R. W. Turner, for the appellants. Book debts are "property" within the meaning of s. 59, sub-s. 1, of the Stamp Act, 1891. The question is whether in the circumstances of this case these book debts are property locally situate out of the United Kingdom. In delivering the judgment of the Privy Council in *Commissioner of Stamps* v. *Hope* (1), a case relating to probate duty, Lord Field said: "A debt per se, although a chattel and part of the personal estate which the probate confers authority to administer, has, of course, no absolute local existence; but it has been long established in the Courts of this country . . . . that a debt does possess an attribute of locality," and he went on to say that a debt by contract "could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be, and it was held therefore to be bona notabilia within the area of the local jurisdiction within which he resided." In *Guthrie* v. *Walrond* (1) Fry J. held that a bequest in a will of all the testator's "estate and effects in Mauritius" included a debt owing to him by persons in Mauritius. Applying the principle of these decisions to the present case, these book debts are property in Argentina and are therefore locally situate out of the United Kingdom, within the meaning of s. 59, sub-s. 1. The Crown will rely on *Smelting Co. of Australia* v. *Inland Revenue Commissioners* (2), where it was held that a patent, the operation of which was confined to New South Wales, was not property locally situate out of the United Kingdom, and on *Danubian Sugar Factories* v. *Inland Revenue Commissioners* (3), where the same thing was held in respect of the benefit of a contract for the sale of land in Rumania; but the former case cannot be regarded as authoritative since the decision of the House of Lords in *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine* (4) that the goodwill of a business may be property locally situate out of the United Kingdom. The *Danubian Sugar Factories Case* (3) is distinguishable, for a debt which is due and owing is not the same thing as the benefit of an executory contract. [He also referred to the judgment of North J. in *In re Queensland Mercantile and Agency Co.* (5) and to *Attorney-General* v. *Hope*. (6)]

---

(1) [1891] A. C. 476, at p. 481.

[SCRUTTON J. referred to *Benjamin Brooke & Co.* v. *Inland Revenue Commissioners*. (7)]

Sir S. O. Buckmaster, S.-G., and *W. Finlay*, for the Crown. Although the particular question which arises in this case has never been decided, there are principles underlying the authorities which shew that a debt owing in a foreign country to a foreigner or to an Englishman is not property locally situate out of the United Kingdom within the meaning of s. 59, sub-s. 1. A debt is not capable of being locally situate out of the United Kingdom, for a debt is nothing more than a right in one man to recover money from another, and it is a right which can be exercised in this country at any time when both the debtor and the creditor happen to be within the jurisdiction of the Courts of this country. A debt cannot be said to follow the locality of the debtor and to have the same local situation as he has at any particular time in the same way that the local situation of a personal chattel follows that of the person in whose possession it is for the time being. For the purpose of the probate duties the rule is different because in that case assets are being administered, and for that purpose even a debt has to be treated as having a local situation, and it is treated as being in the place where the creditor can sue for it, that is, where the debtor is resident. The goodwill of a business, which was dealt with in *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine* (1), is different from a debt, for, as was pointed out by Lord Macnaghten in that case (2), the one attribute common to all cases of goodwill is the attribute of locality. But in the case of debt the attribute of locality is entirely lacking. The decision of the Court of Appeal in the *Smelting Co. of Australia Case* (3) has not been overruled by the decision of the House of Lords in the *Muller Case* (1): see *Urban* v. *Inland Revenue Commissioners.* (4) A patent is for the present purpose upon exactly the same footing as a debt, for it is not tangible property but merely confers a personal right. In the *Danubian Sugar Factories Case* (5) Stirling L.J. pointed out that the subject-matter of the agreement was a personal right against a person resident abroad, and that the case was therefore akin to the *Smelting Co. of Australia Case* (3) and distinguishable from the *Muller Case* (6) (which had not at that time been decided in the House of Lords), where the goodwill was so attached to land as to give it a local situation. This distinction between the two classes of cases was also adopted by the House of Lords in the *Muller Case.* (1)

---

(1) (1883) 22 Ch. D. 573.

(2) [1897] 1 Q. B. 175.

(3) [1901] 1 K. B. 245.

(4) [1901] A. C. 217.

(5) [1891] 1 Ch. 536.

(6) (1834) 2 Cl & F. 84.

(7) [1896] 2 Q. B. 356.

[SCRUTTON J. referred to Dicey's Conflict of Laws, 2nd ed. pp. 232, 310.]

---

(1) [1901] A. C. 217.
(2) Ibid. at p. 224.
(3) [1897] 1 Q. B. 175.
(4) (1913) 29 Times L. R. 141, 476.
(5) [1901] 1 K. B. at p. 259.
(6) [1900] 1 Q. B. 310.

1914

VELAZQUEZ, LIMITED v. INLAND REVENUE COMMISSIONERS.

Turner in reply. There is no foundation for the alleged distinction between goodwill and book debts. In the *Muller Case* (1) Lord Davey said: "The term goodwill is nothing more than a summary of the rights accruing to the respondents from their purchase of the business and property employed in it." [He referred to *In re Maudslay, Sons & Field.* (2)]

Cur. adv. vult.

Feb. 28. SCRUTTON J. read the following judgment:—This is an appeal by Velazquez, Limited, against a decision of the Commissioners of Inland Revenue that a certain conveyance was liable to an ad valorem duty in respect of 8439*l.* 16*s.* 7*d.* due under an agreement made by Velazquez, Limited, in England. That sum was the apportioned consideration for the sale of certain book debts owing to Herbert Velazquez by persons residing in the Argentine Republic in respect of a business carried on by him solely at Buenos Aires.

The ad valorem duty was claimed under s. 59, sub-s. 1, of the Stamp Act, 1891, which imposes such a duty on a contract made in England for the sale of any property, except "property locally situate out of the United Kingdom." The question in the case is whether debts due by Argentine subjects in respect of an Argentine business to a person then resident in the Argentine, but afterwards in the United Kingdom, were "property locally situate out of the United Kingdom."

The nature of book debts, for the purpose of the Stamp Act, is singularly free from direct authority. In *Benjamin Brooke & Co.* v. *Inland Revenue Commissioners* (3), in 1896, it appeared that the Commissioners had not claimed duty on similar book debts; but the apparent failure to claim it in the *Muller Case* (4), in 1899, was explained by the fact discovered on sending for the original papers that the agreement in question excluded book debts from the sale.

The Solicitor-General, for the Commissioners, contended that this Court at any rate was bound by the two decisions of the

---

(1) [1901] A. C. at p. 227.
(2) [1900] 1 Ch. 602.
(3) [1896] 2 Q. B. 356.
(4) [1900] 1 Q. B. 310.

Court of Appeal in the case of the *Smelting Co. of Australia* (1), in 1896, and the case of the *Danubian Sugar Factories* (2), in 1901; and that those decisions were not affected by the decisions of the Court of Appeal or the House of Lords in *Muller's Case.* (3) This indeed had been held in a case exactly similar to the case of the *Smelting Co. of Australia* (1), namely, *Urban* v. *Inland Revenue Commissioners* (4), both by Horridge J. and the Court of Appeal.

I had first, therefore, to consider whether the principles laid down in the two cases cited applied to this case, and were affected, as regards this case, by the decision of the House of Lords in the *Muller Case.* (5) In the case of the *Smelting Co. of Australia* (1) the English agreement related to the sale of a share in a New South Wales patent, and a licence to use it in New South Wales. This was held by the Court of Appeal not to be property locally situate out of the United Kingdom. One ground of the decision, that "property" is confined to real property, has I think been overruled by the House of Lords in the *Muller Case* (5), but the other ground, that an incorporeal right, such as a chose in action, has no local situation, remains. In the case of the *Danubian Sugar Factories* (2), where the benefit of an agreement to erect a sugar factory in Rumania and cultivate land in connection with it was assigned in England, the Court of Appeal followed the previous case and held that it was not affected by their intermediate decision in the *Muller Case.* (6) In the *Muller Case* (6) the English agreement was for the sale of, inter alia, the goodwill of a margarine factory in Germany, and the Court of Appeal had held that this goodwill was property locally situate out of the United Kingdom. In the *Danubian Sugar Factories Case* (7) Stirling L.J. explained this decision as one that the subject-matter, goodwill, was so attached to land that it was "locally situate," whereas a mere personal right had no local situation, following in this the *Smelting Co.'s Case.* (1)

Lastly, the House of Lords affirmed the decision of the Court of Appeal in the *Muller Case.* (1) Some of the language in that case is not very consistent with the previous decisions, and indeed it is obvious that Lord Lindley (see pp. 236 to 238) disagreed with the *Smelting Co.'s Case* (2), but I have the decision of the Court of Appeal in *Urban's Case* (3) that the *Smelting Co.'s Case* (2) is not overruled by the *Muller Case.* (1)

---

(1) [1897] 1 Q. B. 175.

(2) [1901] 1 K. B. 245.

(3) [1900] 1 Q. B. 310; [1901] A. C. 217.

(4) 29 Times L. R. 141, 476.

(5) [1901] A. C. 217.

(6) [1900] 1 Q. B. 310.

(7) [1901] 1 K. B. at p. 259.

I am therefore, in my opinion, bound to hold that a personal right to a debt not attached in any way to land has no local situation. It is immaterial what my own view would have been without the Court of Appeal decisions, but it is obvious that if the matter is reconsidered by a tribunal that can deal with it, the views of Lord Lindley in the *Muller Case* (1), the probate practice as to foreign book debts, as stated by the Privy Council in *Commissioner of Stamps* v. *Hope* (4) and *Rex* v. *Lovitt* (5), and the views expressed by Mr. Dicey in his work on the Conflict of Laws, 2nd ed., pp. 232, 309, 310, and 313, will demand the most careful attention.

I am, however, bound, as a judge of first instance, in the present state of the authorities to dismiss this appeal with costs.

Appeal dismissed.

Solicitors for appellants: *Stileman & Neate.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

---

(1) [1901] A. C. 217.

(2) [1897] 1 Q. B. 175.

(3) 29 Times L. R. 476.

(4) [1891] A. C. 476.

(5) [1912] A. C. 212, at p. 218.

F. O. R.

HARPER *v.* EYJOLFSSON.

1914
Jan. 15.

Solicitor—Illegal Agreement—Permitting Name to be used for Profit of Unqualified Person—Solicitors Act, 1843 (6 *&* 7 *Vict. c.* 73), *s.* 32.

There is nothing illegal in the employment by a solicitor of an unqualified person upon the terms that he shall receive a share of the profits of business introduced by him to the solicitor.

Sect. 32 of the Solicitors Act, 1843, provides that "if any attorney or solicitor shall wilfully and knowingly . . . . permit or suffer his name to be anyways made use of in any . . . . action, suit, or matter upon the account or for the profit of any unqualified person . . . . knowing such person not to be duly qualified . . . . every such attorney or solicitor so offending shall and may be struck off the roll, and for ever after disabled from practising as an attorney or solicitor . . . ."

By the first clause of an agreement entered into between a solicitor and an unqualified person the solicitor agreed to engage the unqualified person as his managing clerk, and to pay him a salary of 3*l.* 10*s.* per week, and in addition a bonus of 25 per cent. on all gross costs and other profits (exclusive of all disbursements) received by the solicitor on all business introduced by the unqualified person either directly or indirectly. Clause 3 provided that in the event of the determination of the engagement the bonus of 25 per cent. was to be continued to be paid, notwithstanding such determination, less 3*l.* 10*s.* per week:—

Held, that although the agreement would have been valid if it had contained the first clause only, it was rendered invalid by reason of the third clause inasmuch as that clause shewed that the business which was the subject of the agreement was the business of the clerk which was to be carried on in the name of the solicitor for the clerk's profit, and the agreement was therefore illegal under the words in s. 32 of the Solicitors Act, 1843, which prohibit a solicitor from permitting his name to be used in any matter for the profit of an unqualified person.

Appeal by the defendant, Eyjolfsson, against a verdict and judgment given in an action tried in the Mayor's Court, London, before the Common Serjeant and a jury.

The action was brought by Mr. Harper, a managing clerk in the employment of Mr. David Nimmo, a solicitor, of 10 and 12, Copthall Avenue, against the defendant, the managing director of a company known as the Finance Corporation, Limited, to recover damages for malicious prosecution.

1914

HARPER
v.
EYJOLFSSON.

The plaintiff was employed by Mr. Nimmo upon the terms of the agreement contained in the following letter:—

"Old Serjeants' Inn Chambers, E.C.
"16th April, 1913.

"To G. R. Harper, Esq.

"I agree to engage you as my managing clerk and to pay you a salary of three pounds ten shillings per week and in addition by way of salary I agree to pay you a bonus of twenty-five per cent. on all gross costs and other profits (exclusive of all disbursements) received by me in respect of all business introduced by or through you either directly or indirectly.

"The salary of three pounds ten shillings to be paid weekly and the bonus of twenty-five per centum to be paid quarterly on account taken both of them as from the twenty-fourth December one thousand nine hundred and twelve. The first account to be taken on the twenty-fourth June one thousand nine hundred and thirteen.

"In the event of the termination of your engagement as my managing clerk which is to be terminated by three calendar months' notice on either side the said bonus of twenty-five per cent. is to be continued to be paid to you notwithstanding such termination less three pounds ten shillings per week.

"In the event of the death of both or either of us whilst any part of the said bonus of twenty-five per cent. shall be due and unpaid I undertake that such bonus shall be paid by me or my personal representative to you or your personal representative as the case may be.

"On request by you or your personal representative I agree to produce to you or your personal representative or any person authorised by you or them my drafts or bills of costs delivered by me and my books of account for the purpose of ascertaining what costs have been received by me or are outstanding and also the amount of bonus payable to you or your personal representative.

"David Nimmo."

The plaintiff and the defendant were acquainted, and on August 6, 1913, the plaintiff went to the defendant's offices and produced to him a cheque post-dated to August 12, 1913, for

15*l.*, payable to one Scampton, and drawn in the name "J. Balfour Brown." The defendant in his evidence at the trial stated that the plaintiff told him that Scampton had sent the cheque to him to see whether he could get it cashed, and that it was drawn by Mr. Balfour Browne, K.C. Eventually the defendant on the same day handed the plaintiff a cheque for 12*l.* 10*s.* in exchange for the post-dated cheque, being induced to do so, according to his story, by the plaintiff's representation that it had actually been signed by Mr. Balfour Browne, K.C. The post-dated cheque was dishonoured, and had not in fact been drawn by Mr. Balfour Browne, K.C., but by another person named J. Balfour Brown. The defendant on August 13, 1913, took out a summons against the plaintiff returnable at the Guildhall justice room for obtaining the cheque for 12*l.* 10*s.* by false pretences. On the same day Mr. Nimmo wrote to the plaintiff suspending his employment pending the decision of the Court and the investigation of the facts, and did not take the plaintiff back again into his employment.

The summons was dismissed by an alderman sitting at the Guildhall on August 18, 1913, the defendant electing to be bound by recognizance under the Vexatious Indictments Act, 1859, to prefer an indictment at the Central Criminal Court against the plaintiff.

In the ordinary course the indictment would have been preferred at the sessions of the Central Criminal Court held in September, 1913, but on August 26, 1913, a letter was received from the defendant's solicitor stating that the defendant did not intend to prefer the bill of indictment against the plaintiff and that he would apply at the sitting of the Central Criminal Court for leave to withdraw from the prosecution. The application was attended by both plaintiff's and defendant's counsel, and the Recorder gave leave for the recognizance to be vacated and for the prosecution to be withdrawn.

On September 5, 1913, the plaintiff commenced an action in the Mayor's Court against the defendant to recover damages for malicious prosecution.

At the trial in the Mayor's Court, which took place on October 30 and 31, 1913, before the Common Serjeant and a jury, the learned judge admitted the agreement of April 16, 1913, in evidence in support of the plaintiff's claim for damages. The jury returned a verdict for the plaintiff for 175*l.*, and judgment was entered accordingly. The defendant appealed upon the ground (inter alia) that at the trial the judge had admitted in evidence the agreement of service between the plaintiff, who was not a qualified solicitor, and his employer, Mr. David Nimmo, a qualified solicitor, notwithstanding that the agreement was illegal and void and in contravention of the Solicitors Act, 1843. (1)

Rigby Swift, K.C., and *S. M. Knight*, for the defendant. The judge was wrong in admitting the agreement as evidence at the trial. The plaintiff is an unqualified person for whose benefit the solicitor, Mr. Nimmo, permitted his name to be made use of. The agreement is therefore illegal as being in contravention of s. 32 of the Solicitors Act, 1843: *Tench* v. *Roberts.* (2) The agreement amounts to much more than a contract to remunerate a managing clerk by way of commission on business introduced by him. It constitutes a partnership between the solicitor and the plaintiff. It was merely a device for carrying on the business of the plaintiff in the name of the solicitor.

A. Powell, K.C., and *J. Oddy*, for the plaintiff. The agreement is good in law. *Tench* v. *Roberts* (2) is distinguishable. The agreement in that case went much further than the agreement in the present case, and at the time *Tench* v. *Roberts* (2) was decided it was thought that participation in profits of a business was the test of partnership. In *Cox* v. *Hickman* (3), however, it was held that that is not the only test, and that decision was incorporated in the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 2. There is no evidence in the present case that the solicitor allowed his name to be used for the profit of the plaintiff. There is nothing in the Solicitors Act, 1843, which prohibits the solicitor from allowing a clerk a share of the profits arising from business introduced by him and giving him a smaller salary than he would otherwise pay him. It is clear from *Galloway* v. *Corporation of London* (1) that there is nothing illegal in a portion of a solicitor's profits being paid to a person who is not a member of the legal profession. The first clause of the agreement is only a method of remuneration. It provides for a payment to the clerk of a percentage on the profits made by the solicitor. That is a common arrangement in solicitors' offices and there is nothing illegal in it. Nor is there anything illegal in the third clause. In order to explain it the first clause must be read together with it, and it means that if the plaintiff introduces a client who remains with the solicitor after the plaintiff has left the solicitor's employment, the solicitor will continue to pay the commission of 25 per cent. on the profits subsequently made from that client who so remains. It is merely a provision for those deferred payments. The probability is that the 3*l.* 10*s.* was inserted in the third clause by mistake and that the solicitor intended to continue to pay the 25 per cent. to the plaintiff after his engagement as managing clerk had been determined, but assuming it is to stand as part of the agreement, the legal position is not affected, the only difference being that it must be taken that a rather less percentage of commission was to be paid to the plaintiff after he left the employment of the solicitor.

---

(1) Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 32: "If any attorney or solicitor shall wilfully and knowingly act as agent in any action or suit in any court of law or equity, or matter in bankruptcy, for any person not duly qualified to act as an attorney or solicitor as aforesaid, or permit or suffer his name to be anyways made use of in any such action, suit, or matter upon the account or for the profit of an unqualified person . . . . knowing such person not to be duly qualified as aforesaid . . . . every such attorney or solicitor so offending shall and may be struck off the roll, and for ever after disabled from practising as an attorney or solicitor . . . ."

(2) (1819) 6 Madd. 145, n.

(3) (1860) 8 H. L. C. 268.

Rigby Swift, K.C., in reply. There is no objection to the first clause, but the third clause is illegal. It provides for the plaintiff's business being carried on in the name of the solicitor, the plaintiff being an unqualified person. Under the agreement the bonus is payable on all business introduced to the solicitor by the plaintiff, even upon business introduced after the plaintiff has left the solicitor's employment. Therefore upon the fair construction of the agreement the business upon which the

(1) (1867) L. R. 4 Eq. 90.

commission was to be paid was the plaintiff's business, not that of the solicitor. If the engagement is terminated by death of the plaintiff the agreement provides for the payment of all percentages earned up to that time to the plaintiff's personal representatives, but if the engagement is terminated by notice further work may be introduced and commission paid upon it. The 25 per cent. in the third clause was therefore no part of the remuneration of a solicitor's clerk. It is a mode of hiding the identity of the person whose business it is. The agreement therefore ought not to have been submitted to the jury at the trial.

RIDLEY J. In this case a point has arisen upon the agreement of April 16, 1913, with regard to the position of the plaintiff, who was the managing clerk of Mr. Nimmo, a solicitor. At the trial the agreement was put in evidence in order to define the position of the plaintiff with a view to obtaining the damages found by the jury. The agreement is one difficult to construe. The question is whether it constitutes a breach of s. 32 of the Solicitors Act, 1843, and is therefore illegal and ought not to have been given in evidence.

The first clause provides that the plaintiff is to be engaged as managing clerk and that he is to be paid a salary of 3*l.* 10*s.* a week and in addition a bonus of 25 per cent. on all gross costs and other profits received by Mr. Nimmo in respect of business introduced by the plaintiff.

The third clause, which is the only one it is necessary to construe, provides that "in the event of the termination of your engagement as my managing clerk which is to be terminated by three calendar months' notice . . . . the said bonus of twenty-five per cent. is to be continued to be paid to you notwithstanding such termination less three pounds ten shillings per week."

The question is whether these provisions come within the terms of s. 32 of the Solicitors Act, 1843, as being an agreement by which a solicitor permits his name to be made use of in any action, suit, or matter upon the account or for the benefit of any unqualified person. The question is whether by the provisions of this agreement it is to be understood that the business on which the 25 per cent. bonus was to be received was the business of the plaintiff or Mr. Nimmo. I think it must be conceded that if the business was the solicitor's business the agreement would not be within the prohibition contained in the Act of 1843, because it would not in that event be the case of a person who was not duly qualified to practise as a solicitor in fact doing so.

During the first period when the plaintiff was still managing clerk to Mr. Nimmo it appears to me that it might properly be said that the business was introduced by him as agent for his employer, and therefore he could not be said to be practising as an unqualified person, although the persons he was introducing were his clients and the business he introduced was his business, because he was acting as agent only for Mr. Nimmo. That would be the common case where a managing clerk merely introduces clients and business to his employer as his agent.

I think, however, that there are circumstances in the present case which shew that the clients introduced by the plaintiff were his clients and the business his business. I therefore think it was the plaintiff's business which Mr. Nimmo was enabled to put on his books. If the agreement had ended at the first clause and there had been no provision as to what was to happen when the plaintiff's employment had ceased I should have thought it was a proper agreement. But when I read that the 25 per cent. bonus less 3*l.* 10*s.* a week is to be continued to be paid to the plaintiff notwithstanding the termination of his engagement I come to the conclusion that the arrangement can only be satisfactorily explained by taking it to be the plaintiff's business. I think that the true construction of the agreement is that as the business which came through the plaintiff was the plaintiff's business he was still entitled to receive the 25 per cent. bonus less 3*l.* 10*s.* a week after the termination of his employment. I acknowledge that I have had some difficulty in coming to this conclusion. It has been argued that this business was Mr. Nimmo's, and I can quite understand that that view might be taken by persons who honestly endeavoured to understand the agreement. I almost came to that conclusion myself, but after considering all the circumstances I think the proper conclusion is that this was the plaintiff's business and that the agreement is therefore illegal and ought not to have been admitted as evidence at the trial.

The appeal must be allowed and there must be a new trial.

Bankes J. I have come to the same conclusion. I think the matter is one of very considerable difficulty. The question we have to decide turns simply on the construction of the agreement entered into between the plaintiff and his employer. There are two sections of the Solicitors Act, 1843, which deal with unqualified persons practising as solicitors. The first is s. 2, which enacts that no unqualified person shall act as an attorney or solicitor. It would be necessary for the defendant in order to bring the agreement within that section to shew that it constituted a partnership between the plaintiff and Mr. Nimmo. But in my opinion it does not do so, and therefore it does not offend against that particular section.

But further there is s. 32, which deals with the case of an attorney or solicitor who allows his name to be used in any way for the profit of an unqualified person in any action, or suit or matter in bankruptcy. The agreement of April 16, 1913, is perfectly general. It does not define the nature of the business but is expressed in terms which would cover any action, or suit or matter in bankruptcy. I therefore think that so far as the language of the agreement is concerned it is wide enough to come within that part of the section which prohibits a solicitor from permitting his name to be in any way made use of "in any such action, suit, or matter" upon the account or for the profit of any unqualified person. The real question is what is the true construction of the agreement as a whole. As to that question it seems to me that two different views may be taken. One is that it is an agreement which provides merely for the remuneration to be paid to a solicitor's clerk, and with regard to that I think it is perfectly legitimate to provide that a solicitor's clerk may by way of remuneration receive a share of the profits arising from the business introduced by him to the solicitor. He may receive that share of the profits by way of remuneration for services rendered either in introducing the business or for work done in connection with the business or both. If that is the true construction

1914

HARPER
v.
EYJOLFSSON.

Bankes J.

of the agreement it would be in my opinion a perfectly legitimate one.

The other view of the agreement is that it is not an agreement for the remuneration of a managing clerk in respect of business introduced by him to the solicitor, but that it is an arrangement for the allocation of the profits derived from business which is the managing clerk's business and which is as between him and the solicitor to remain the managing clerk's business, which is to be carried on in the name of the solicitor but is to remain the business of the managing clerk. If that is the true view of the agreement it comes within the mischief aimed at in s. 32.

The third clause of the agreement is in my judgment decisive of the matter. The agreement provides for the engagement of the plaintiff as managing clerk. It provides for the payment of a salary of 3*l*. 10*s*. a week and for the payment of a bonus of 25 per cent. on all gross costs and profits "in respect of all business introduced by or through you either directly or indirectly" and for accounts to taken for the purpose. If the business were business introduced to the solicitor it would become the solicitor's business if the arrangement were merely to arrive at the rate of remuneration. But in this case there is a provision as to what is to happen if the engagement as managing clerk is terminated. The third clause says: "In the event of the termination of your engagement as my managing clerk which is to be terminated by three months' notice on either side the said bonus of twenty-five per cent. is to be continued to be paid to you . . . . less three pounds ten shillings per week."

On behalf of the plaintiff Mr. Powell contended that that is merely a provision for deferred pay and that it deals with the case of a client introduced by the managing clerk whose business is not completed at the time when the plaintiff leaves and who desires to remain as a client with Mr. Nimmo rather than change to some fresh solicitor into whose service the plaintiff might enter, and that it is only a method of remunerating the clerk for the business introduced by him.

I asked Mr. Powell to give some explanation as to why the provision as to the deduction of 3*l*. 10*s*. a week after the plaintiff left Mr. Nimmo's employment was introduced into the agreement if

1914

HARPER
v.
EYJOLFSSON.

Bankes J.

the business was Mr. Nimmo's business, but he has failed to satisfy me upon that point, and I cannot conceive any reason for introducing it except to say in effect: "This is your (Harper's) business. While you remain in my employment I will pay you 3*l.* 10*s.* a week for the work you do in connection with it and we will share the profits in certain proportions and I agree that you shall continue to receive your proportion of the profits after you leave my service, but I will not undertake to do your work for nothing and I therefore deduct 3*l.* 10*s.* per week which I shall have to pay some one else for doing the work you would have done." If that is the true construction of the agreement, as I think it is, it seems to me that the business is quite plainly the business of the unqualified person and that it is to be carried on in the name of the solicitor. That is an agreement in contravention of the law as enacted by s. 32 of the Solicitors Act, 1843, and ought not to have been admitted in evidence. There must therefore be a new trial.

Appeal allowed. New trial ordered.

Solicitor for appellant: *J. K. Torkington.*
Solicitor for respondent: *W. T. Hick.*

J E A.

HESSION *v.* JONES.

1914
Feb. 10, 12, 13

Practice—Appeal from County Court—Non-appearance of Respondent—Motion to reinstate—Jurisdiction of High Court—Rules of the Supreme Court, 1883, *Order* XXXVI., *r.* 33 ; *Order* LIX., *r.* 16.

The plaintiff brought an action in the county court and recovered judgment. The defendant appealed. By some inadvertence the plaintiff, respondent to the appeal, was not represented at the hearing of the appeal.

The Divisional Court in the absence of the plaintiff heard the appeal, reversed the judgment of the county court, and ordered judgment to be entered for the defendant. The plaintiff, on hearing of the result of the appeal, after the order of the Divisional Court had been passed and entered, applied to the Court to reinstate and rehear the appeal:—

Held, that the Court had no jurisdiction to grant the application.

In re St. Nazaire Co. (1879) 12 Ch. D. 88 followed.

Motion by the plaintiff praying the Court to reinstate and rehear an appeal from the county court of Glamorganshire holden at Ystrad, in the following circumstances.

The plaintiff brought an action in the county court for the price of twenty cases of eggs sold to the defendant.

On the hearing on December 2, 1913, the defendant set up the following defences:—

(1.) That the eggs had been consigned by a route not in accordance with the defendant's instructions, and that they were in consequence unreasonably delayed in transit;

(2.) that they arrived in a broken condition;

(3.) that twenty-four cases had been sent instead of twenty cases as ordered.

The defendant failed to prove that the eggs had been consigned otherwise than as ordered, or that there was any unreasonable delay, or that their condition on arrival was such as to entitle the defendant to reject them. As to the third defence, the county court judge was of opinion that the defendant, having assigned as his reason for rejecting the goods the delay in delivery, could not rely on the reason that the amount of goods sent did not correspond with the amount ordered. He therefore gave judgment for the plaintiff for 50*l.* and costs. The defendant appealed. The Divisional Court (Ridley and Bankes JJ.) reversed the judgment of the county court judge and entered judgment for the defendant. The present motion was to reinstate and rehear this appeal.

The affidavit of John Bryant, of Pontypridd, solicitor for the plaintiff, in support of the motion stated as follows: "On December 22 last I was served with a notice of appeal from the county court judge's decision to the Divisional Court and I regret to say that the appeal escaped my memory altogether. I was under the impression that Messrs. Wrentmore & Son, the London agents of Mr. Spickernell, the defendant's solicitor, who sometimes act as my London agents, had, when they wrote to me at Pontypridd that the appeal had been entered, also given notice to Messrs. Gibson & Weldon, who act as my London agents. I therefore thought that I should receive notice when the case came into the list. Owing to pressure of work I had overlooked the matter and the appeal escaped my memory altogether until I saw the result of the appeal in the local paper. In consequence of this I was not represented in any way on the hearing of the appeal and the appeal was allowed with costs against my client the plaintiff . . . ." In the circumstances he applied, in order that an injustice might not be done to the plaintiff, that the Court should reinstate the appeal in order that the same might be reheard, or in the alternative that leave should be given to the plaintiff to appeal to the Court of Appeal from the decision of the Divisional Court.

McCardie, for the plaintiff. The Court has jurisdiction to make this order: Rules of the Supreme Court, Order XXXVI., r. 33; Order LIX., r. 16 (1); *Walker* v. *Budden* (2); *Ex parte Streeter, In re Morris* (3); *Allum* v. *Dickinson* (4): *Vint* v. *Hudspith* (5); *In re Grove.* (6)

---

(1) Rules of the Supreme Court, 1883, Order XXXVI., r. 33: "Any verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court or a judge upon such terms as may seem fit, upon an application made within six days after the trial; such application may be made either at the assizes or in Middlesex."

Order LIX., r. 16: "The High Court shall have power to extend the time for appealing, or to amend the grounds of appeal, or to make any other order, on such terms as the Court shall think just, to ensure the determination on the merits of the real questions in controversy between the parties."

(2) (1879) 5 Q. B. D. 267.

(3) (1881) 19 Ch. D. 216.

(4) (1882) 9 Q. B. D. 632.

(5) (1885) 29 Ch. D. 322.

(6) (1888) 4 Times L. R. 272.

1914

HESSION
v.
JONES.

Herbert Smith, for the defendant. The Court has no jurisdiction to reinstate and rehear an appeal where the appellant has appeared and been heard and the Court has determined the appeal, and the order of the Court has been passed and entered: *Flower* v. *Lloyd* (1); *In re St. Nazaire Co.* (2); *Preston Banking Co.* v. *William Allsup & Sons.* (3) There is all the difference between this case, where there has been a hearing of the appeal, and the cases where there has been no hearing but the appeal has merely been struck out, as in *Walker* v. *Budden* (4), *Ex parte Streeter, In re Morris* (5), and *Allum* v. *Dickinson.* (6) This difference was pointed out by the Court of Appeal in *In re Grove.* (7) Order XXXVI., r. 33, relates to the hearing of an action and has no application to the present application. The case of *Vint* v. *Hudspith* (8), decided upon that rule, is equally inapplicable. Order LIX., r. 16, of the Rules of the Supreme Court, although wide in its terms, cannot confer on the Court jurisdiction to rehear its own order passed and entered. The case of *In re Grove* (7) shews that the plaintiff has a remedy by way of appeal to the Court of Appeal; that is his proper and only course.

McCardie in reply.

BANKES J. This is an application on behalf of the plaintiff, the respondent on an appeal to this Court, to restore the appeal to the list. Such an application may be made either (1.) to restore a case which has merely been struck out and has never been heard and decided because the appellant did not attend; or (2.) to restore a case in which the appellant has appeared and argued his appeal in the absence of the respondent and the Court has heard the appeal and come to a decision. In the first case the application is to restore an appeal which has not been heard; in the second case the application is to set aside a decision after a hearing which in the respondent's view is not satisfactory because he was not present. This is an application of the second class, to set aside an order of this Court made by Ridley J. and myself after hearing. The appellant was present and produced a copy of the county court judge's notes and was ready to proceed with his appeal. The respondent was not represented. The appellant was the defendant in the county court. An action had been brought against him for the price of certain cases of eggs ordered by him for delivery at a named station. The plaintiff delivered a larger quantity than that ordered. The defendant had refused to take delivery on the grounds (1.) that there was unreasonable delay in forwarding and (2.) that the eggs were not in proper condition. When he was sued in the county court he took the further point under s. 30, sub-s. 2, of the Sale of Goods Act, 1893, that the plaintiff could not succeed because he had tendered a different quantity from that ordered. The defendant claimed the right to reject on that ground also. The point was taken before the county court judge. The plaintiff contended that the defendant could not rely upon it, because he had not given it as his reason when he first rejected the goods. The county court judge decided the point in favour of the plaintiff. In the opinion of Ridley J. and myself he was wrong in so deciding. Before deciding the appeal we considered whether there was any evidence that the defendant had waived or abandoned or in any way estopped himself from relying on this defence, and came to the conclusion that he had not done so. Accordingly we made an order allowing the appeal; we set aside the judgment of the county court, and ordered judgment to be entered for the defendant in that Court. That order was duly drawn up by the officer of this Court; a copy of the order was obtained by the solicitor for the appellant, the defendant below, and he was thereupon in a position to have the record in the county court altered by striking out the judgment for the plaintiff and entering judgment for the defendant. I do not know whether that was done, but there is no doubt that the order of this Court was drawn up and perfected before any step was taken to set it aside. It is clear therefore that this is an application to review an order deliberately made after argument and to entertain a fresh argument upon it with a view to ultimately confirming or reversing it. Has the Court jurisdiction to do this? I may say at once that if we have I should not exercise it in the present case, because any application of this sort must be supported by an affidavit of merits. I have read the affidavit in this application and can find nothing which would lead me to alter the opinion I formed on the hearing of the appeal. But it is necessary to consider the jurisdiction of the Court. The application is supported by an affidavit in which the solicitor for the plaintiff says that by an unfortunate mistake he did not instruct any one to appear for the respondent on the appeal. Now the Divisional Court is a statutory Court of appeal created for hearing appeals from county courts. It is constituted under s. 45 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), and it is provided by s. 17 of the Judicature Act, 1875 (38 & 39 Vict. c. 77), and s. 23 of the Judicature Act, 1884 (47 & 48 Vict. c. 61), that the Rule Committee shall have power to make rules regulating the procedure on appeals from inferior Courts to the High Court. Under these enactments certain rules have been made, among them those incorporated in Order LIX. of the Rules of the Supreme Court, 1883. In my view our jurisdiction is not absolutely limited by those rules because we have reserved to us as judges of the High Court by s. 16 of the Act of 1873 all the powers and jurisdiction of all the judges whose jurisdiction was transferred, and also by s. 73 of the Act of 1873 and s. 21 of the Act of 1875 the right to exercise all the forms and methods of procedure which were in force before the Judicature Acts and are not inconsistent with those Acts and the rules made under them. Our jurisdiction therefore is in part a statutory jurisdiction regulated by the Rules of the Supreme Court, 1883, and partly an inherent jurisdiction which we possess as judges of the High Court. The question is whether either by the rules or by reason of our inherent jurisdiction we have the power to reinstate this appeal. Order XXXVI., r. 33, is one of a number of rules dealing with the trial of an action and applies only to verdicts and judgments at the trial. It might be contended that the existence of such a rule is rather against the plaintiff than in his favour, because, if there was an inherent jurisdiction to set aside an order where one party does not appear at the trial, the rule would not have been necessary. On the other hand it might be said that the rule was made ex abundanti cautela, and so in my view that point is not of much weight. Then does this application come within the special rules regulating the procedure of the Divisional Court in appeals from inferior Courts? Read in their widest sense the words of Order LIX., r. 16, that the Court may "make any other order, on such terms as the Court shall think just, to ensure the determination of the merits of the real questions in controversy between the parties," might afford grounds for the present application, but, having regard to the position and context of those words, I think that it would be straining their meaning to make them cover this case. The rule is not aimed at applications of this class. In my opinion the rules do not confer on us the jurisdiction we are asked to exercise.

---

(1) (1877) 6 Ch. D. 297.

(2) 12 Ch. D. 88.

(3) [1895] 1 Ch. 141.

(4) 5 Q. B. D. 267.

(5) 19 Ch. D. 216.

(6) 9 Q. B. D. 632.

(7) 4 Times L. R. 272.

(8) 29 Ch. D. 322.

Then as to the inherent jurisdiction of the Court. Before the Judicature Acts the Courts of common law had no jurisdiction whatever to set aside an order which had been made. The Court of Chancery did exercise a certain limited power in this direction. All Courts would have power to make a necessary correction if the order as drawn up did not express the intention of the Court; the Court of Chancery, however, went somewhat further than that, and would in a proper case recall any decree or order before it was passed and entered; but after it had been drawn up and perfected no Court or judge had any power to interfere with it. That is clear from the judgment of Thesiger L.J. in the case of *In re St. Nazaire Co.* (1) Therefore apart from some authority to the contrary it would seem that neither under the rules, nor under the statutes, nor by the practice before the Judicature Acts has the Court this jurisdiction. But Mr. McCardie has referred to several authorities from which he says we ought to infer that judges of the Court of Appeal have taken the view that the Divisional Court has this jurisdiction. Of those authorities my view is that some are not applicable and none contains a decision upon the point. At most they contain dicta upon a question which was not in issue and upon which there had been no argument. First there is *Walker* v. *Budden.* (2) It was there held that where an appellant from the judge in chambers to the Queen's Bench Division had not appeared, and his appeal had been struck out, he could not appeal to the Court of Appeal from the order of the Queen's Bench Division striking out his appeal. The Court of Appeal did say "the defendant must apply to the Queen's Bench Division, which possibly, in the exercise of its discretion, may allow the appeal from chambers to be argued." But that was a case of the first class I have mentioned, where the appellant had not appeared, the appeal had been struck out, and the Queen's Bench Division was only asked to reinstate a case which had never been heard. That is not this case. The next authority was *Ex parte Streeter, In re Morris.* (1) There the question was whether the Court of Appeal would entertain an appeal from an order made in the absence of the appellant. In the course of the argument *Walker* v. *Budden* (2) was referred to as an authority that no appeal lay in the circumstances. Jessel M.R. said "That case does not shew that you cannot appeal on the merits because you did not appear on the original hearing. You are still entitled to appeal on the ground that the adverse claimant did not make out her title." That case goes to shew that the plaintiff would have a right of appeal in the present case. If so he is not without a remedy, and this Court need not strain its jurisdiction in order to avoid an injustice. Next in *Allum* v. *Dickinson* (3) Jessel M.R. intimated an opinion that "if the plaintiff does not appear and lets judgment be taken against him by default, he cannot appeal. If there has been a mistake he must apply to the Court of first instance to have the case restored and reheard." The question was whether the plaintiff on a special case who did not appear on the hearing of the special case could appeal to the Court of Appeal from the order of the Divisional Court striking the case out of the list. This again is a case of the first class where the action or other proceeding is struck out without any hearing. The case of *Vint* v. *Hudspith* (4) is clearly distinguishable. Judgment had been given on the trial of the action and the case came within Order XXXVI., r. 33. The last case was *In re Grove.* (5) There on an appeal from chambers to the Divisional Court the respondent on that appeal did not appear,

---

(1) 12 Ch. D. 88.

(2) 5 Q. B. D. 267.

(1) 19 Ch. D. 216.

(2) 5 Q. B. D. 267.

(3) 9 Q. B. D. 632.

(4) 29 Ch. D. 322.

(5) 4 Times L. R. 272.

and the appeal was allowed. The respondent in the Divisional Court appealed to the Court of Appeal. An objection was taken that in the circumstances his appeal could not be heard. The Court said that "though the course pointed out in *Vint* v. *Hudspith* (1) of applying to the Court below for a rehearing was the proper course, still the Court of Appeal had jurisdiction to hear the appeal, the case of a respondent not appearing in the Court below being very different from an appellant not appearing there." The Court there draws a pointed distinction between the case where a proceeding is struck out for non-appearance of the appellant, and this case where, although the respondent was absent, the appellant has argued the case and satisfied the Court that he was right. In my view this Court has no jurisdiction to make the order it is invited to make, and this motion must be dismissed.

Avory J. I am of the same opinion. It is not suggested that any section of the Judicature Acts or of the County Courts Act, 1888, or any of the Rules of Court made under those statutes gives this Court in express terms power to make the order asked for, unless it be Order lix., r. 16, of the Rules of the Supreme Court, 1883. In my view that rule applies only to those powers which the Court has on the ordinary hearing of an appeal to make such an order as the Court may think just for the purpose of determining the merits of the case; it gives no jurisdiction to this Court to grant this application. Then it was contended that apart from the Rules of Court there is an inherent jurisdiction in the Court to make this order. On this point I agree with all that has been said by Bankes J. as to the authorities which have been cited. The motion must be dismissed.

Motion dismissed.

Solicitors for applicant: *Gibson & Weldon, for John Bryant, Pontypridd.*

Solicitors for respondent: *Wrentmore & Son, for W. G. Spickernell, Tonypandy.*

---

(1) 29 Ch. D. 322.

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.

1914

Jan. 15, 16;
Feb. 3.

SKEATE *v.* SLATERS, LIMITED.

[1912 S. 946.]

Practice—Jury Action—Disagreement of Jury—Application for Judgment—Appeal—Power to enter Judgment—Rules of the Supreme Court, 1883, *Order* XXXVI., *r.* 39; *Order* LVIII., *r.* 4.

In an action tried with a jury the judge was asked at the conclusion of the plaintiff's case to withdraw the case from the jury on the ground that the plaintiff had failed to make any case against the defendants. The judge refused to do so. Witnesses were then called for the defence. The jury disagreed. Subsequently an application was made to the judge to enter judgment for the defendants upon the above ground and also upon the ground that upon all the evidence in the case the jury could not reasonably have found a verdict for the plaintiff. The judge refused to enter judgment for the defendants. On appeal from his refusal to do so:—

Held by Lord Reading C.J. and Buckley L.J., that the Court of Appeal has power under Order LVIII., r. 4 (and, per Buckley L.J., a judge at the trial also has power under Order XXXVI., r. 39), to enter judgment for a defendant if upon the case as a whole the evidence for the plaintiff was so weak that a verdict in his favour would have been set aside as unreasonable.

Millar v. *Toulmin* (1886) 17 Q. B. D. 603, *Allcock* v. *Hall* [1891] 1 Q. B. 444, and *Paquin* v. *Beauclerk* [1906] A. C. 148, followed.

Per Phillimore L.J.: The Court of Appeal ought to enter judgment only in a case where on the evidence the jury should have been directed to find a verdict one way, there being no evidence to support a verdict the other way, and ought not to do so in a case in which there is some evidence for the jury, even though the case is such that if the verdict is one way a new trial might be ordered on the ground that the verdict was unreasonable.

Held, also, by the Court, that on the facts of this case judgment ought not to be entered for the defendants.

A judge who at the conclusion of the plaintiff's case has ruled that there is some evidence for the jury is entitled at the conclusion of the whole case to reconsider his ruling and to enter judgment for the defendant if he is then of opinion that the plaintiff's evidence fails to disclose any cause of action against the defendant.

Peters v. *Perry* (1894) 10 Times L. R. 366 considered.

APPEAL by the defendants from the refusal of Lawrence J. to enter judgment for the defendants in an action tried with a special jury.

The action was brought to recover damages for breach of an implied warranty by the defendants to supply food reasonably fit for human consumption. The plaintiff alleged that he had been made ill through eating some curried mutton while lunching at the defendants' restaurant. At the conclusion of the plaintiff's case, counsel for the defendants submitted that the plaintiff had made out no case. Lawrence J. declined to withdraw the case from the jury, though he thought that the case made by the plaintiff was very weak. Witnesses were then called for the defence. The jury were unable to agree and were discharged.

On a subsequent date counsel for the defendants applied to Lawrence J. to enter judgment for the defendants on the grounds (1.) that at the end of the plaintiff's case there was no evidence fit to be submitted to a jury; (2.) that upon all the evidence in the case the jury could not reasonably have found a verdict in the plaintiff's favour. Lawrence J. refused the application. The defendants appealed.

Tindal Atkinson, K.C., and *Herbert Smith*, for the defendants. The plaintiff's evidence disclosed no cause of action against the defendants and the learned judge ought at the conclusion of the plaintiff's case to have withdrawn the case from the jury and entered judgment for the defendants. But even if he was right in not stopping the case, he ought at the conclusion of the case to have entered judgment for the defendants under Order XXXVI., r. 39 (1), on the ground that upon all the evidence in the case the jury could not reasonably find a verdict in the plaintiff's favour. This course was adopted by Bruce J. in *Peters* v. *Perry*. (2) That was an action for personal injuries tried with a jury. Bruce J. was asked to nonsuit the plaintiff on the ground that there was no evidence of negligence; he refused to do so, and after evidence had been given for the defence, the jury disagreed. Bruce J. then entered judgment for the defendants on the ground that he was not satisfied that there was any evidence upon which the jury could reasonably have found for the plaintiff. In any event this Court ought in the circumstances of this case and in the exercise of the powers conferred by Order LVIII., r. 4 (1), to enter judgment for the defendants. In *Millar* v. *Toulmin* (2) Lord Esher M.R. said that that rule empowered the Court of Appeal "to give the judgment which ought to follow from the evidence produced at the trial." It is true that when *Millar* v. *Toulmin* (2) was before the House of Lords (3) Lord Halsbury expressed a doubt whether Order LVIII., r. 4, did give the Court of Appeal that power; that was only a dictum, because, as the decision of the Court of Appeal was reversed on the facts, it became unnecessary to decide the point. Subsequently in *Allcock* v. *Hall* (4) the question was again considered by the Court of Appeal, and it was held that the Court had power under Order LVIII., r. 4, on a motion for a new trial to direct judgment to be entered for either of the parties, instead of ordering a new trial. Finally in *Paquin* v. *Beauclerk* (5) in the House of Lords the view of the Court of Appeal expressed in *Millar* v. *Toulmin* (2) and *Allcock* v. *Hall* (4) as to the scope of Order LVIII., r. 4, was referred to by Lord Loreburn L.C., who said (6): "Obviously the Court of Appeal is not at liberty to usurp the province of a jury; yet, if the evidence be such that only one conclusion can properly be drawn I agree that the Court may enter judgment." Applying these authorities to the present case, the evidence against the defendants taken as a whole was so weak that if the jury had found a verdict for the plaintiff it would have been set aside as unreasonable; judgment should therefore have been entered for the defendants, as there is no reason for supposing that on a new trial the plaintiff could make out a stronger case. The fact that the jury disagreed cannot have the effect of putting the defendants in a worse position than they would have been if a verdict had been given for the plaintiff.

---

(1) Order XXXVI., r. 39: "The judge shall, at or after trial, direct judgment to be entered as he shall think right, and no motion for judgment shall be necessary in order to obtain such judgment."

(2) 10 Times L. R. 366.

---

(1) Order LVIII. r. 4: ". . . . The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require . . . ."

(2) 17 Q. B. D. 603.

(3) (1887) 12 App. Cas. 746.

(4) [1891] 1 Q. B. 444.

(5) [1906] A. C. 148.

(6) Ibid. at p. 161.

C. A.
1914

SKEATE
v.
SLATERS,
LIMITED.

[LORD READING C.J. referred to *Perkins* v. *Dangerfield.* (1)]

David White and *Elkin*, for the plaintiff. It is impossible to say in this case either that the plaintiff's evidence disclosed no case against the defendants, or that on the evidence as a whole a verdict for the plaintiff would have been unreasonable. In any case the judge, having once ruled that the plaintiff's case could not be withdrawn from the jury, could not subsequently rule that there was no case. With regard to the powers of the Court of Appeal under Order LVIII., r. 4, the only case in which this Court ought to enter judgment after a trial with a jury is where the evidence is all one way and the judge at the trial would have been justified in directing the jury to find a verdict for one side or the other. [They referred to *Metropolitan Ry. Co.* v. *Wright.* (2)]

Herbert Smith replied.

Cur. adv. vult.

Feb. 3. LORD READING C.J. read the following judgment:— The defendants appeal from the refusal of Lawrence J. to enter judgment for them upon an application made to him after the jury had disagreed in the trial before him. The action is brought to recover damages for breach of an implied warranty by the defendants to supply food reasonably fit for human consumption. The plaintiff's case is that he had suffered from ptomaine or food poisoning caused by the consumption of food supplied to him at the defendants' restaurant.

On February 20, 1912, between 12.30 and 1 P.M. he went to the defendants' restaurant, where he was served with luncheon including a portion of curried mutton. Within one and a half to two hours later he was seized with violent pains and became so ill that he sent for Dr. Clarke, who visited him that night and continued to attend him subsequently. The plaintiff stated that hitherto he had enjoyed good health and on February 20 had not suffered from any internal pain or discomfort until he was taken ill in the afternoon. Dr. Clarke was called at the trial and said: "In my opinion it" (the illness) "was caused by something he had eaten for lunch, in all probability the curried mutton." Dr.

(1) [1879] W. N. 172.

(2) (1886) 11 App. Cas. 152.

Willcox gave evidence for the plaintiff and said: "Probably something he had for lunch was the cause . . . . the most likely thing would be the curried mutton."

At the end of the plaintiff's case the defendants submitted that the plaintiff had failed to prove a case against them. The learned judge in deciding that the case should be left to the jury said that he could not stop it upon the ground that there was no evidence, but he thought the case made by the plaintiff very weak. The trial then proceeded and the defendants called persons in their service and otherwise who gave evidence as to the quality, character, and condition of the food supplied, and the defendants also called medical gentlemen who expressed the opinion that the plaintiff's illness was not caused by the food he had eaten at luncheon, and, indeed, that the plaintiff had not suffered from ptomaine poisoning. The trial took place on February 6 and 7, 1913, and, as the jury could not agree, they were discharged on February 7 without having given a verdict. On February 12 the defendants applied to the judge to enter judgment for them under Rules of the Supreme Court, Order XXXVI. r. 39, upon the grounds that (1.) at the end of the plaintiff's case there was no evidence fit to be submitted to a jury; (2.) upon all the evidence in the case the jury could not reasonably find a verdict in the plaintiff's favour. The learned judge in refusing the application said: "As I indicated at the trial, I thought that the evidence was insufficient, but the difficulty I have is in saying that there was no evidence. I think that no evidence means no evidence that a reasonable man could act upon. But I thought it proper at the time to give the plaintiff an opportunity of possibly obtaining a decision from the jury and to give you also the opportunity possibly of obtaining such a verdict as I thought you ought to obtain, but I do not think that I ought now to alter that." From this decision the defendants appeal and submit that the learned judge should have entered judgment for them.

During the argument before this Court we came to the conclusion that the judge was right in refusing to enter judgment for the defendants at the end of the plaintiff's case. Although we were of opinion that the evidence was, as the judge said, very weak, we thought that sufficient evidence had been given on the plaintiff's behalf to entitle him to have his case submitted to the jury.

It was further contended by Mr. Tindal Atkinson that, notwithstanding that the learned judge had decided to leave the case to the jury at the end of the plaintiff's case and that this Court affirmed that decision, the learned judge ought to have reconsidered it after the jury had disagreed, and that, taking into account both the plaintiff's and the defendants' evidence, he should have directed judgment to be entered for the defendants on the ground that the plaintiff had failed to make a case against them, and that, even if there was some evidence against the defendants, it was so slight and insufficient that twelve reasonable men could not find a verdict in the plaintiff's favour.

The questions before this Court are: (1.) Was the learned judge's refusal to accede to the defendants' application right; (2.) if his decision was right, can this Court and should this Court enter judgment for the defendants?

It was argued for the plaintiff that the learned judge, having left the case to the jury, could not subsequently alter his decision and enter judgment for the defendants. I do not agree with this contention. It is always open to a judge, if he thinks fit, to reconsider his decision that there was no case to go to the jury and to enter the judgment for the defendants if he is then of opinion that the plaintiff has failed to make a case against the defendants. Frequently at trials with a jury, the judge, although he thinks the plaintiff has not made a case, submits it to the jury in order that their views may be ascertained. This practice very often has the advantage of making an end of the contest as to the facts and in the event of a successful appeal against the judge's ruling enables this Court to dispose of the action without sending it for retrial. If the judge thinks a case, however weak, has been made by the plaintiff which, unanswered, would justify a verdict for the plaintiff, and, therefore, submits the case to a jury, the judge ought not thereafter to enter judgment for the defendants, however strong may be his opinion that, upon all the evidence, including that of the defendants, they should succeed, unless he would have been justified in directing the jury to find a verdict for the defendants. If he could not have so directed the jury he should leave the facts to their decision and should not usurp their province.

On the defendants' behalf *Peters* v. *Perry* (1) was cited as an authority supporting their contention before us. In that case Bruce J. did enter judgment for the defendants after refusing to withdraw the case from the jury and after the jury had disagreed. It was argued before us that Bruce J. did so upon the ground that no jury could reasonably find a verdict for the plaintiff. Upon careful consideration of that case I do not think it supports the defendants' argument. Bruce J. was of opinion that it was open to him to reconsider his decision at the end of the plaintiff's case to submit the case to the jury and that he ought to enter and he did then enter judgment for the defendants. He evidently thought that the defendants' evidence did not in any particular support the plaintiff's case and that he would have been right in directing the jury at the close of the evidence on the defendants' behalf to find a verdict for the defendants.

Upon consideration of the whole of the evidence given in this case I am of opinion that Lawrence J. would not have been justified in directing the jury to find a verdict for the defendants, and that he was right in refusing the application on both points.

It was further argued that, as under Order LVIII., r. 4, this Court has power "to draw inferences of fact and to give any judgment and make any order which ought to have been made and to make such further or other order as the case may require," we should enter judgment for the defendants upon the ground that, even if the learned judge's decision was right, the evidence was so weak and insufficient that if a verdict had been found in the plaintiff's favour this Court would not have allowed it to stand. I think it would be within the powers of this Court under Order LVIII., r. 4, to make such an order if it thought fit. It will be observed that the words of this Order differ from those in Order XL., r. 10, relating to an application for a new trial; there the words are: "The Court may draw all inferences of fact, not inconsistent with the finding of the jury, and if satisfied

---

(1) 10 Times L. R. 366.

C. A.
1914

SKEATE
v.
SLATERS,
LIMITED.

Lord Reading
C.J.

that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, give judgment accordingly." There the power to draw inferences of fact is limited when there is a verdict of a jury to such inferences as are not inconsistent with the finding of the jury. The application before us is not for a new trial, but is an appeal from the decision of the judge. It is, however, important to consider whether the powers of this Court on appeal from a trial by a jury are limited to those formerly exercised by the King's Bench Division under Order XL., r. 10. *Millar* v. *Toulmin* (1) decided that under Order LVIII., r. 4, greater powers are given to the Court of Appeal than were conferred under Order XL., r. 10, and, in the words of Lord Esher, include "the power, if all the necessary materials are before the Court, of giving that judgment which, in the opinion of the Court, ought to be the judgment between the parties, even though such judgment be inconsistent with the findings of the jury." In that case the Court of Appeal entered judgment for the plaintiff, which was deciding affirmatively the rights of the plaintiff without the assistance of the jury, and left the question (if any) as to the amount to be decided by the Master. Lord Halsbury in the same case in the House of Lords (2) criticized the exercise of this power. The other Lords expressed no opinion upon this point and the House of Lords did not reverse the judgment upon that ground. In *Allcock* v. *Hall* (3) the Court of Appeal again considered the question with the assistance of the observations of Lord Halsbury, and came to the conclusion that they had such powers and exercised them by entering judgment for the defendant. Be it observed that Lindley L.J. added that the Lords Justices deciding that case had consulted their colleagues in the other branch of the Court who had carefully considered the point and agreed with the decision. Lord Loreburn in *Paquin* v. *Beauclerk* (4), referring to these two cases, said: "Obviously the Court of Appeal is not at liberty to usurp the province of a jury; yet, if the evidence be such that only one conclusion can properly be drawn I agree that the Court may enter judgment. The distinction between cases where there is no evidence and those where there is some evidence, though not enough properly to be acted upon by a jury, is a fine distinction, and the power is not unattended by danger. But if cautiously exercised it cannot fail to be of value." The authority of *Allcock* v. *Hall* (1), approved by Lord Loreburn, is clearly binding upon us, and I am of opinion that this Court, if satisfied that it has all the necessary materials before it, and that no evidence could be given at a retrial which would in this Court support a verdict for the plaintiff, ought to enter judgment for the defendants. As Lord Loreburn has said, this power should be cautiously exercised, and upon careful consideration I am not prepared to take that course in this case, as I am not convinced that further material may not be produced in the event of a retrial, or that a verdict in the plaintiff's favour on such evidence as may be given could not be supported in this Court. As the case may be retried and I do not know what evidence may be given, I think it better to say no more.

---

(1) 17 Q. B. D. 603.

(2) 12 App. Cas. 746.

(3) [1891] 1 Q. B. 444.

(4) [1906] A. C. at p. 161.

I think, therefore, this appeal should be dismissed.

Buckley L.J. read the following judgment:—For the determination of this case it is necessary to bear in mind two things. The first is that the application before the Court is not a motion for a new trial but is an appeal from the refusal of the judge to enter judgment for either party. The second is that, while neither the judge at the trial nor this Court of Appeal is or are judges of fact, yet both the one and the other are, for all purposes, judges of the question of the absence of fact, by which I mean, judges of the question whether there was any evidence to go to the jury or any evidence upon which a jury could reasonably find a verdict for the plaintiff.

Upon the appeal the Court of Appeal have power to make such order as the judge ought to have made at the trial. I will first investigate what his powers would have been. At the conclusion of the plaintiff's case the defendants submitted that there was no case to go to the jury. The learned judge said: "I do not think this is a case that I can stop upon the ground that there is no

(1) [1891] 1 Q. B. 444.

evidence, but I think it is very weak. At the same time I think it ought to be left to the jury." At the conclusion of the defendants' case, and after the jury had failed to agree upon a verdict, he said: "As I indicated at the trial, I thought that the evidence was insufficient, but the difficulty I have is in saying that there was no evidence. I think that no evidence means no evidence that a reasonable man could act upon. But I thought it proper at the time to give the plaintiff an opportunity of possibly obtaining a decision from the jury, and to give you also the opportunity possibly of obtaining a verdict as I thought you ought to obtain, but I do not think that I ought now to alter that." There are some matters as to which a judge may have to rule in the course of a trial upon which he cannot go back upon his ruling. For instance, if he rules that certain evidence is not admissible and the case proceeds upon the footing of that ruling, he cannot subsequently reconsider that ruling and admit the evidence, for the case might, of course, have been differently conducted if that had been his ruling. But where the judge at the conclusion of the plaintiff's case is asked to rule whether there is a case to go to the jury or not, he may certainly, I think, decline to rule that there is no evidence, may allow the defendants' evidence to be taken, may allow the verdict to go, and none the less may give judgment for the defendants upon the footing that there is no case. Such a course is often convenient, for if the Court of Appeal should think the judge's ruling was erroneous the advantage is gained that it is unnecessary to send the case back for trial before another jury. Further, if the judge at the conclusion of the plaintiff's case rules as he did here, there is nothing, I think, to prevent him at the termination of the hearing from reviewing his first opinion. This he may do in my judgment (if he has not disposed of the case) by finding upon further consideration that upon the plaintiff's evidence there was after all no case. But further, I think he may and ought upon all the evidence in the case (including the defendants' evidence) so to rule if, upon the case as a whole, he finds that the evidence fails to disclose a case upon which the jury could reasonably find a verdict for the plaintiff. Under Order XXXVI., r. 39, he is to direct judgment to be entered as he shall think

Buckley L.J.

right, that means of course as he judicially thinks right, and if he is judicially of opinion that upon the case as a whole—that upon the evidence both of the plaintiff and of the defendant—there is no case, it is his duty, I think, to enter that which he thinks is the right judgment, namely, a judgment for the defendant. If the judge at the trial could have taken this course but has taken a contrary course, the Court of Appeal can discharge his order and make the order which he ought to have made.

But the powers of the Court of Appeal do not end there. Under Order LVIII., r. 4, the Court of Appeal has power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. This rule was, I think expressly intended to enable the Court of Appeal, when the matter is before them, to deal with it as justice shall require. In *Clouston & Co.* v. *Corry* (1) in the Privy Council Lord James of Hereford in delivering the opinion of the Committee upon an appeal from judgment entered after trial by jury spoke of rules of procedure "existing in this country enabling judgment to be entered according to the evident justice of the case." This was but a dictum, but in my opinion it exactly expresses that which was intended to be effected by the existing rules relating to the powers of the Court of Appeal to enter such judgment as is required by the evident justice of the case. We are not bound, I think, to look at the plaintiff's evidence to the exclusion of the defendants' evidence. We are entitled, upon the evidence as a whole, to say whether the evidence is such as that twelve reasonable men could properly arrive at the conclusion that the plaintiff was entitled to a verdict. If we are of opinion that they could not, the Court has, I think, full power to enter judgment for the defendants, not because they find facts, for that is the province of the jury, but because they find that there are no facts sufficient to support a verdict in favour of the plaintiff. If in this case the jury had found a verdict for the plaintiff and the application had been for a new trial or for judgment, the Court would certainly have had power, if it thought right, to enter judgment for the defendants. Its power so to do cannot be less because one impediment in the way of the defendant, namely, a verdict against him, is absent.

---

(1) [1906] A. C. 122, at p. 130.

The decision of this Court in *Millar* v. *Toulmin* (1) was a decision in a case where the jury had found a verdict for the defendant and the question was whether there should be a new trial. The Court gave judgment for the plaintiff. That decision as to the jurisdiction of the Court was criticized by Lord Halsbury in the House of Lords (2), but his criticism was made upon the footing not that the Court of Appeal were saying, as we are here asked to say, that the plaintiff failed, but that they were giving an affirmative judgment in the plaintiff's favour, thus, as he says, claiming to exercise a right to find a verdict themselves and assess damages. That criticism has no bearing upon the power of the Court to do that which is in question here, namely, not affirmatively to give any relief, but negatively to say that no case for relief has been made out. Accordingly in *Allcock* v. *Hall* (3) the decision in *Millar* v. *Toulmin* (1) was expressly followed. Those decisions are undoubtedly binding upon us. They were referred to by Lord Loreburn in *Paquin* v. *Beauclerk* (4), where he says: In *Allcock* v. *Hall* (3) "all the judges of the Court of Appeal concurred in the opinion that they were at liberty to draw inferences of fact and enter judgment in cases where no jury could properly find a different verdict. Obviously the Court of Appeal is not at liberty to usurp the province of a jury; yet if the evidence be such that only one conclusion can properly be drawn I agree that the Court may enter judgment. The distinction between cases where there is no evidence and those where there is some evidence, though not enough properly to be acted upon by a jury, is a fine distinction, and the power is not unattended by danger. But if cautiously exercised it cannot fail to be of value." *Millar* v. *Toulmin* (1) and *Allcock* v. *Hall* (3) were cases in which the question arose upon a motion for a new trial and expressions were used to the effect that it was relevant to see whether all the necessary materials were before the Court, whether the Court had before it all the evidence that could be reasonably expected to be obtained. This was in those cases material for the following reason. The Court had there to choose between new trial and judgment. In the former alternative the evidence, of course, would be taken afresh. In choosing the latter alternative the Court had to consider whether it was right to deprive (as by entering judgment it would deprive) a party of the opportunity of adducing fresh evidence. No such question arises here. Nobody is asking and nobody could ask for a new trial. The jury have failed to agree and the plaintiff could set his action down again for trial if he were so minded. The only question here is whether, upon all the materials in this case, as they stand, the defendant is or is not right in saying that, upon the whole of the evidence, the plaintiff has not shewn such facts as that twelve reasonable men could possibly give a verdict in his favour. If he has not, then this Court is bound to give judgment for the defendants.

---

(1) 17 Q. B. D. 603.

(2) 12 App. Cas. 746.

(3) [1891] 1 Q. B. 444.

(4) [1906] A. C. at p. 161.

I pass then to consider the effect of the evidence in this case. The plaintiff has to prove that the illness from which he suffered was attributable to some poisonous or dangerous ingredient in, or condition of, the food which he took at the defendants' restaurant. It is not enough that he should prove that his illness resulted from that food. For it may be that the condition of his body was such (as that for instance he was suffering from duodenal ulcer) that wholesome food, or the too rapid consumption of food resulting in indigestion, set up mischief in an already existing dangerous condition of his own body. He must prove that the ill results were due to the quality of the food, to something poisonous or dangerous in the food. Further it is not sufficient that he should say, I have adduced evidence to shew that it is possibly due to that cause. He must go beyond possibility to probability, and to such an extent of probability that a reasonable person would be satisfied that the probability is strong enough to induce belief that the right cause has been traced. I doubt whether there is evidence of probability, and certainly whether the evidence (assuming there is some) is sufficient to induce belief that the probability, if there be one, is the truth. Dr. Clarke said: "In my opinion it was caused by something he had for lunch, in all probability the curried

C. A.
1914

SKEATE
v.
SLATERS,
LIMITED.

Buckley L.J.

mutton." Dr. Willcox said: "The most likely thing would be the curried mutton." It was upon these statements that we thought that at the close of the plaintiff's case there might be some ground for saying that there was some evidence, though very weak evidence, to trace the illness to the food. But they amount to little more than an inference from a sequence of events, and further they do not deal with the question whether, assuming that the food was the cause, the effect resulted from the action of wholesome food upon a disordered stomach or the action of poisonous food upon a healthy stomach. The plaintiff has to prove not only post hoc but propter hoc. He has proved post hoc by the sequence of events, but upon the question of propter hoc I doubt whether there is any evidence, and, if there be any, whether the evidence is more than speculative based upon probabilities. On the other hand there are strong probabilities the other way, as for instance that Baxter, who took the same food in all respects, suffered no ill results: that some twenty people ate the same curried mutton and some thirty more ate curries of other meats made with the same curry powder and no one of them experienced any ill results: and further that the plaintiff six months later suffered in a similar way, a fact which leads to the belief that the cause lay in the condition of his body. To balance probabilities is for the jury, but if the balance be such that a jury could not reasonably find that the balance resulted in other than one direction, and that against the plaintiff, then it is for the judge to find accordingly. As a judge of the absence of fact I am strongly disposed to say that the plaintiff has failed to adduce evidence upon which twelve reasonable men could find a verdict in his favour, and if this is so, I think that this Court not only has the power, but is, by the rules of the Court, intended to state and give effect to the conclusion that the plaintiff has not adduced evidence upon which a verdict could be found in his favour. For it is, in my opinion, impossible to say that whereas if the jury had found a verdict for the plaintiff, this Court could have set it aside and have entered judgment for the defendants, yet, inasmuch as the jury have failed to agree the Court has a less power. On the other hand I agree that the power to give judgment for the defendants ought to be very cautiously exercised, and that, if there is a doubt in the matter, the case should be left to the decision of another jury. That there is a doubt here is sufficiently evidenced by the fact that my brethren think as expressed in their judgments. Under these circumstances I do not differ from them in the conclusion that this appeal must be refused.

PHILLIMORE L.J. read the following judgment:—The plaintiff brings his action for damages which he says he has sustained by reason of the defendant company having supplied him on February 19, 1912, with unwholesome food for luncheon at their restaurant in Throgmorton Street, whereby he incurred ptomaine poisoning. The defendant company, while admitting that the plaintiff partook of luncheon on that date, deny that the food was unwholesome or could, or did, cause him any damage. The action came on for trial before Lawrence J. and a special jury on February 6 and 7, 1913.

At the close of the plaintiff's case, counsel for the defendant company submitted that there was no case to go to the jury. The judge said in substance that it was a weak case, but that he could not stop it. Evidence was then given for the defendant company. No further submission was made at the end of the evidence, and the case went to the jury in the usual way. The jury could not agree, and were discharged. Counsel for the defendant company then renewed their submission that the plaintiff had shewn no case. The judge reconsidered the matter, but adhered to his former opinion, and refused to give judgment for the defendant company. It is from this refusal that appeal is now brought.

We are, I believe, all of opinion that the judge was right in holding that upon the plaintiff's evidence there was some case to go to the jury. But it is contended that, at the conclusion of the case, the judge was entitled to look at the evidence given for the defendant company, as well as that given for the plaintiff, and to deduce from the two the conclusion that the plaintiff had failed. In the first place, no such submission was made to the judge at the conclusion of the evidence, and I do not believe he or we should have heard of the suggestion if it had not been for the disagreement of the jury. In the second place it seems to put the judge in the position of the jury. The suggestion is contrary to principle, and is, I believe, without precedent. The judge at the trial has the right and duty of saying whether the plaintiff has given sufficient evidence to entitle him, if it is unanswered, to a verdict. But he has no power to decide whether it has been answered or to balance the evidence of the two sides. The suggestion comes to this: if at the end of the evidence the judge comes to a very decided opinion either way he may take the case out of the hands of the jury. It is said that there is one precedent, the case of *Peters* v. *Perry* (1) tried by Bruce J. If this case is carefully studied it will be seen that it is no precedent. A judge to whom application is made to enter judgment for the defendant on the ground that the plaintiff has made out no case may, notwithstanding that he refuses to stop the case, and allows it to go to the jury, upon reconsideration, hold that there is no case, even after the verdict of the jury. Sometimes he prefers to take a verdict, so that, in case his view of the law be wrong, the facts may be decided once for all without the expense of a second trial. This may result in a jury giving a verdict for the plaintiff and the judge then giving a judgment for the defendant, and is not without objection as it leads to misconception. But it may be done, and has been done in reported cases. I think I can recollect doing it once, or perhaps twice, in sixteen years. When a judge takes this course and rules at the end of the whole case that the plaintiff has made out no case, he has to consider the defendant's evidence, not with a view of seeing whether it weakens the plaintiff's case, but with a view of seeing whether it strengthens it. Just as the plaintiff cannot complain if he is held bound by his own evidence, so cannot the defendant complain if any evidence which he gives which helps the plaintiff (and it not unfrequently happens in cases of tort that it does so) is added to the plaintiff's evidence. All that Bruce J. did was to consider the defendants' evidence with a view to seeing whether it strengthened the plaintiff's case. Finding that it did not, and holding, on reconsideration, that the plaintiff's evidence was insufficient to launch a case, he gave judgment for the defendants. This supposed precedent being out of the way, there is no authority for saying that Lawrence J. could, much less ought to, have taken into account the defendants' evidence; and as we have agreed that upon the plaintiff's evidence there was a case, it must go to the jury and be tried, and the judgment appealed from is right.

---

(1) 10 Times L. R. 366.

It is said, however, that though the judgment may have been right for Lawrence J. to give, we ought to give a different one; that our powers under Order LVIII., r. 4, are more extensive, and that we can take upon ourselves a larger interference with the jury. No doubt we can draw inferences of fact and we can receive further materials, and upon those further materials make the proper order, but here we have no further materials, other than those which Lawrence J. had. The jury had further materials which were for them to consider, and on which they failed to agree, and the case must be tried again with such evidence as the parties will then be prepared with, not necessarily the same, it may be more or less. There is, again, no precedent for the suggestion that we should thus interfere, and say that, though Lawrence J. was right, his judgment must be reversed.

It is suggested, however, that there is an analogy to be derived from cases where motion is made for a new trial. This is not that case, as was pointed out by a member of the Court during the argument; and I am not sure that the analogy is sound. Anyhow it fails. Upon motion for new trial, the Divisional Court, when such motions came before it, having power under Order XL., r. 10, and the Court of Appeal having the same power, did in certain cases give judgment for the appellant, instead of sending him back for a new trial, and this we—now that the Appeal Court is the Court of first instance on motions for new trials, and perhaps further assisted by Order LVIII., r. 4—can also do. But only in appropriate cases. Those reported on this subject are, I believe, the following: *Eastland* v. *Burchell* (1), *Hamilton* v. *Johnson* (2), *Bryant* v. *North Metropolitan Tramways Co.* (3), *Millar* v. *Toulmin* (4), and *Allcock* v. *Hall* (5), in which the Court, either the Divisional Court or the Court of Appeal, entered judgment for the applicant instead of granting a new trial; and *Milissich* v. *Lloyds* (1) and *Clark* v. *Molyneux* (2), in which the Court refused judgment and sent the case down for a new trial. In the last case the language of Bramwell L.J. and Brett L.J. towards the conclusion of their judgments seems to me important. Then there is the comment of Lord Halsbury on *Millar* v. *Toulmin* (3) in the House of Lords, which, coupled with the fact that the judgment of the Court of Appeal was reversed, though on another ground, at any rate reduces its authority.

---

(1) (1878) 3 Q. B. D. 432.

(2) (1880) 5 Q. B. D. 263.

(3) (1890) 6 Times L. R. 396.

(4) 17 Q. B. D. 603.

(5) [1891] 1 Q. B. 444.

The result, I think, is that the cases lay down that when the Court, to which the motion for new trial is made, sees that the verdict was wrong; and sees also that upon the admitted facts, or the only possible evidence that could be given, the verdict should be the other way, and has all the materials before it, it may conclude the case, dispense with another trial by a jury, which will either result in a verdict for the applicant or be itself set aside and so toties quoties, and at once give judgment. And I may go a step further and say that this Court under Order LVIII., r. 4, has the further power which the Divisional Court had not upon motions for new trial to complete the materials before it by drawing any inferences of fact; whereas a Divisional Court was limited to drawing inferences of fact not inconsistent with the finding of the jury. In *Allcock* v. *Hall* (4) Lopes L.J. states his reason as follows: "I am satisfied that if the case were sent to a new trial, no fresh evidence could be usefully given on behalf of the plaintiffs. All the materials are before the Court to enable it to deal with the case if it has power to do so." Lord Loreburn L.C. in *Paquin* v. *Beauclerk* (5) correctly summarizes the decision in *Allcock* v. *Hall*. (6) "In the latter case all the judges of the Court of Appeal concurred in the opinion that they were at liberty to draw inferences of fact and enter judgment in cases where no jury could properly find a different verdict. Obviously the Court of Appeal is not at liberty to usurp the province of a

(1) (1877) 36 L. T. 423.
(2) (1877) 3 Q. B. D. 237.
(3) 12 App. Cas. 746.
(4) [1891] 1 Q. B. at p. 447.
(5) [1906] A. C. at p. 161.
(6) [1891] 1 Q. B. 444.

jury, yet, if the evidence be such that only one conclusion can properly be drawn I agree that the Court may enter judgment." I think his words "no jury could properly find" mean what they say, and do not mean "the jury could not have properly found." I incline to think that by the word "properly" he means what Lord Atkinson means by the word "legitimately," and that both are referring to cases where a jury ought to be directed by the judge to find the verdict one way, there being no evidence to support a verdict the other way, and not to cases which must be left to the jury, though if the verdict be one way a second inquiry may be directed.

The case of *Paquin* v. *Beauclerk* (1) deserves study. The four noble and learned Lords who pronounced judgment, while differing two and two as to the inference of fact, and/or the conclusion of law, agreed that there was no need for a new trial, because there was no dispute about the facts. As Lord Robertson says, there were no questions of fact remaining in dubio, and it was a sharp question of law.

If this were, which it is not, an application for a new trial, I should not say that upon the whole evidence the jury ought to have been directed to return a verdict for the defendant company. I might possibly think that a verdict for the plaintiff was sufficiently unsatisfactory to warrant us in directing a second inquiry; but if the defendant company went further and asked for judgment I should use the language of Brett L.J. in *Clark* v. *Molyneux* (2): "This is not a case in which we ought to enter a verdict for the defendant; for there may be further evidence on a future occasion. We ought, therefore, only to grant a new trial."

In my judgment we can do nothing but simply dismiss this appeal.

Appeal dismissed.

Solicitors for plaintiff: *White & Co.*
Solicitors for defendants: *Hair & Co.*

---

(1) [1906] A. C. 148.

(2) 3 Q. B. D. at p. 249.

F. O. R.

1914
March 4, 9.

CLARKE *v.* WEST HAM CORPORATION.

County Court—Action tried with Jury—Verdict and Judgment for Plaintiff—Application for New Trial on Ground of no Evidence—Power of County Court Judge to grant New Trial—County Courts Act, 1888 (51 *&* 52 *Vict.* c. 43), *s.* 93.

A county court judge, who at the trial of an action with a jury has ruled that there is evidence for the jury and has entered judgment for the plaintiff in accordance with the verdict, has no power to grant a new trial on the ground that there was no evidence for the jury.

Appeal from the refusal of the judge of the Bow County Court to grant a new trial.

The action was brought to recover damages for personal injuries sustained by the plaintiff through the negligence of the defendants in the construction and maintenance of a certain highway, whereby a pony attached to a trap in which the plaintiff was being driven was by reason of a hole in the road caused to be thrown down, and in consequence thereof the plaintiff was thrown out of the trap on to the roadway.

The action was tried with a jury.

At the close of the plaintiff's case it was submitted for the defendants that there was no evidence of negligence on the part of the defendants. The judge refused to withdraw the case from the jury.

Witnesses were called for the defence. The jury found a verdict for the plaintiff for 50*l.*, and judgment was entered for the plaintiff for that sum with costs.

The defendants subsequently applied to the county court judge for a new trial on the grounds that there was no evidence that the defendants had been negligent in the construction or maintenance of the road, and that the verdict was unreasonable and against the weight of the evidence.

The county court judge refused to grant a new trial.

The defendants appealed.

Thorn Drury, K.C. (*Doughty* with him), for the plaintiff. There is a preliminary objection to the hearing of this appeal.

One ground of the application for a new trial was that there was no evidence of negligence. That is not a ground upon which a new trial can be granted. If there was no evidence, judgment should have been entered for the defendants: *Wilton* v. *Leeds Forge Valley Co.* (1) Further, there is no right of appeal against the decision of the county court judge that the verdict was not against the weight of the evidence, unless he applied a wrong principle of law: *How* v. *London and North Western Ry. Co.* (2); and it is not alleged that he did so.

Morten, K.C. (*Simner* with him), for the defendants. The question whether there is any evidence of negligence is a question of law, and there is, therefore, a right of appeal from the decision of the county court judge, on the application for a new trial, that there was some evidence of negligence: *Pole* v. *Bright.* (3) It is true that if the defendants are right in their contention that there was no evidence of negligence the proper course would be, not to grant a new trial, but to enter judgment for the defendants. But it was decided in *Robinson* v. *Fawcett* (4) that on an application for a new trial a county court judge has no power to enter judgment. Therefore, the only thing the county court judge could do, if the defendants are right, was to set aside the judgment and grant a new trial, in order that the question whether there was any evidence might be further considered and dealt with. In any event this Court has power to enter judgment for the defendants although the county court judge could not have done so. That course was followed in *Bryant* v. *North Metropolitan Tramways Co.* (5), where, after a verdict for the plaintiff, a county court judge granted a new trial; the plaintiff appealed, and on the hearing of the appeal it was contended for the defendants that there was no evidence of negligence against them; the Divisional Court (Lord Coleridge C.J. and Wills J.) agreed with that view and entered judgment for the defendants.

LUSH J. said that they would hear the appeal before giving their judgment on the preliminary objection.

(1) (1884) 32 W. R. 461.
(2) [1892] 1 Q. B. 391.
(3) [1892] 1 Q. B. 603.
(4) [1901] 2 K. B. 325
(5) (1890) 6 Times L. R. 396.

Counsel for the defendants then argued on the facts that there was no evidence of negligence.

Cur. adv. vult.

March 8. LUSH J. This case comes before the Court on an appeal by the defendants from a decision of the learned judge of the Bow County Court. The action was brought by the plaintiff to recover damages for injuries sustained by reason of the alleged negligence of the defendants in the construction and maintenance of a certain highway in their district. The particulars of negligence alleged that the foundation of the road had not been properly constructed and that in repairing the roadway the defendants had not taken sufficient precautions to prevent the stones from subsiding, and that the plaintiff's cart was upset in consequence of there being a hole in the road. At the conclusion of the plaintiff's case the defendants submitted that there was no evidence of negligence which could properly be left to the jury. The learned judge refused to withdraw the case from the jury, and, after evidence had been given by witnesses for the defence, the jury returned a verdict for the plaintiff for 50*l.*, and judgment was entered for the plaintiff for that sum with costs.

The defendants subsequently applied to the county court judge for a new trial upon two grounds, first, that there was no evidence of misfeasance on the part of the defendants, and, secondly, upon the ground that the verdict was against the weight of the evidence. The county court judge refused to grant a new trial. He held that there was some evidence to go to the jury, and as to the second ground he held, applying the correct principle of law, that the verdict was one which reasonable jurors might have found, and that it was therefore not against the weight of the evidence. From that decision the present appeal is brought.

A preliminary objection was taken on behalf of the plaintiff to the hearing of the appeal in so far as the appeal was based upon the ground that there was no evidence to go to the jury. The argument for the plaintiff was put in this way. It was said that if there was no evidence for the jury the proper course was to have appealed against the judgment, not to apply for a new trial, because the county court judge had no power on an application for a new trial to enter judgment for the defendants even if he thought that there was no evidence, as he had already ruled at the trial that there was some evidence and had entered judgment for the plaintiff in accordance with the verdict of the jury founded upon that evidence. It was said that as the county court judge had no jurisdiction to grant the only appropriate remedy, namely judgment, if the defendants' contention that there was no evidence was well founded, the application for a new trial on that ground was misconceived, and that this Court has no jurisdiction to hear an appeal from the learned judge's decision on that ground. I think that as a preliminary objection to the jurisdiction of this Court to hear the appeal the objection fails. Sect. 120 of the County Courts Act, 1888, undoubtedly gave a more extensive right of appeal than existed under the earlier Acts. For example, there is now a right of appeal from an interlocutory order made in the county court, and a new trial may be asked for on the ground of misdirection. I think that this Court has jurisdiction to hear the present appeal on the first, as well as on the second, ground of appeal, because the question whether there was any negligence is one of law.

But there appears to me to be a difficulty in the way of our giving the defendants the relief which they ask for, even if we were of opinion that there was no evidence for the jury. A county court judge having once finally adjudicated upon the matters in dispute between the parties, and having entered judgment for one of them, has no power subsequently to set aside his own judgment and enter a different judgment. The question whether in any particular case there is any evidence for the jury is one of law, not of fact. In the present case the learned judge had already ruled at the trial that there was some evidence and had entered judgment on that basis. Therefore, if on the application for a new trial he had held that there was no evidence and had entered judgment he would have been reversing his own previous judgment. It has been held, and indeed it is not disputed, that on an application for a new trial a county court judge cannot enter judgment in favour of the applicant, even if he has changed his opinion and come to the conclusion that his previous judgment was wrong. I think it follows from that that a county court judge has no power to set aside his judgment and to grant a new trial if it is asked for on the ground that there was no evidence to go to the jury, because to do so would involve the reversal by him of his own previous decision given on that question of law. I think, therefore, that in the present case the county court judge was right in refusing the application for a new trial in so far as it was based on the contention that there was no evidence. The proper course for the appellants was to appeal against the original judgment, and not to apply to the county court judge for a new trial.

On the other question, that the verdict was against the weight of evidence, the appeal also fails. It is conceded that in dealing with that question the learned judge applied the right principle of law, and that being so there is an end of the matter, for the question whether the verdict was or was not against the weight of the evidence is one of fact, as to which the decision of the county court judge is final.

It is not necessary in the circumstances for us to consider whether the county court judge was right in holding that there was some evidence for the jury, but as that question has been argued before us it may be convenient that I should state what my view is.

[The learned judge proceeded to consider the evidence and stated that he was of opinion that there was some evidence for the jury.]

ATKIN J. I agree. An application was made to the county court judge to grant a new trial on the grounds that there was no evidence of negligence on the part of the defendants, and that the verdict was against the weight of evidence. The county court judge dismissed the application. With regard to the question whether the verdict was against the weight of evidence, I agree with what Lush J. has said as to that being a question of fact and that there can be no appeal to this Court unless it be shewn that in deciding that question of fact the county court judge has misapplied some principle of law, but it has not been suggested that he did so in this case. The appeal on that point therefore fails.

With regard to the other point, that there was no evidence to go to the jury, that is undoubtedly a question of law, and there is, therefore, a right of appeal from the decision of the county court judge on that point. I entirely agree with what Lush J. has said on the question whether a county court judge has power to grant a new trial upon the ground that there was no evidence to go to the jury. In my opinion he has no power to do so. The position is this. Under s. 93 of the County Courts Act, 1888, every judgment of a county court, except as in the Act provided, is final and conclusive between the parties, but the county court judge has in every case power to grant a new trial. It was, however, decided in *Murtagh* v. *Barry* (1) that that is not an absolute power to be exercised upon any grounds which the judge may think fit, but only on the grounds on which a new trial may be granted in the High Court. The decision in *Murtagh* v. *Barry* (1) was affirmed by the House of Lords in *Brown* v. *Dean*. (2) Further, it has been decided in *Robinson* v. *Fawcett* (3) that a county court judge has no jurisdiction on an application for a new trial to enter judgment for the applicant. In that case Lord Alverstone C.J. said: "He" (the county court judge) "had no jurisdiction, on an application to him for a new trial, to alter the judgment which he had given for the plaintiff and enter judgment for the defendants. The matter is fully dealt with in s. 93 of the County Courts Act, 1888, which provides that every judgment and order of the Court shall be final and conclusive between the parties except in certain specified cases." It appears to me to follow logically from that that an application to a county court judge to grant a new trial upon the ground that there was no evidence to go to the jury must fail. For observe what the position would be. If the defendants' contention that there was no evidence were well founded, the proper course would be to enter judgment for the defendants; it would be a mockery to have a new trial, with all the consequential expense to the parties, when the judge has ruled on the application for a new trial that the case is one in which there is no evidence for the jury. But the county court

---

(1) (1890) 24 Q. B. D. 632.
(2) [1910] A. C. 373.
(3) [1901] 2 K. B. 325.

1914

CLARKE v. WEST HAM CORPORATION.

Atkin J.

judge has, as was decided in *Robinson* v. *Fawcett* (1), no power on an application for a new trial to enter judgment for the applicant, for to do so would be to alter and reverse the judgment which he had given at the trial, which judgment is by s. 93 to be final and conclusive between the parties. I think this also appears from the decision in *Bryant* v. *North Metropolitan Tramways Co.* (2) That was an action in which damages were claimed for negligence. The jury returned a verdict for the plaintiff for 100*l.*, and the county court judge forthwith made an order for a new trial. The plaintiff appealed from this order, and on the hearing of the appeal the defendants' counsel desired to raise the point (which he had not raised at the trial) that the plaintiff's case disclosed no evidence of negligence and that the judge had been wrong in leaving the case to the jury. Lord Coleridge C.J. said that the defendants were entitled to raise that point, and Wills J. agreed that it was an argument which might be urged against an order for a new trial. That again seems to me to indicate that in the present case the contention that there was no evidence to go to the jury, if well founded, would have been a point against, and not in favour of, an application for a new trial.

In my opinion the county court judge had no jurisdiction to grant a new trial upon a ground which is not really a ground for a new trial at all, but is a ground for altering or setting aside the final adjudication upon the case which the county court judge had already arrived at when he directed that judgment should be entered for the plaintiff upon the verdict of the jury.

I desire further to point out that if in a case where the contention is that there was no evidence for the jury the procedure of applying for a new trial could properly be adopted, it would indirectly have the effect of extending the time for appealing from a judgment, which is twenty-one days, to the time within which application may be made for a new trial. That application has to be made at the first Court held after the expiration of twelve days from the day of trial, and there would then be a further twenty-one days in which to appeal from the order refusing a new trial. In the case of some county courts, which are only held at intervals of two months, the result would be that the time would be extended for a period of over two months beyond the period in which an appeal from the judgment could have been brought.

---

(1) [1901] 2 K. B. 325.

(2) 6 Times L. R. 396.

For these reasons I am of opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Clifford Turner & Hopton.*
Solicitors for defendants: *Hillearys.*

F. O. R.

MAYHEW *v.* TRIPP.

1914
March 3, 4.

Seaman—Employment on Fishing Boat—Discharge—Dispute—Submission to Deputy Superintendent of a Mercantile Marine Office—Jurisdiction—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 247, *sub-s.* 2; *s.* 387, *sub-s.* 1.

Sect. 387, sub-s. 1, of the Merchant Shipping Act, 1894, provides that a superintendent of a mercantile marine office shall inquire into, hear, and determine any dispute between the owner of a fishing boat and any seaman of the boat concerning, inter alia, the seaman's discharge, if any party to the dispute calls on him to decide it.

Sect. 247, sub-s. 2, provides that any act done by a deputy duly appointed shall have the same effect as if done by a superintendent:—

Held, that a deputy superintendent has power to adjudicate upon disputes under s. 387.

Appeal from the county court of Suffolk holden at Lowestoft.

The plaintiff, who was a fisherman, was in August, 1913, shipped as waleman on board the steam drifter *Emily* of Lowestoft, belonging to the defendant, for the North Sea fishing voyage which would end in December, 1913. In September the plaintiff was taken ill with diphtheria and was obliged to leave the *Emily* and return to his home. On October 11 the plaintiff, having recovered, applied to the defendant to reinstate him in his employment. The defendant referred him to the skipper, who refused to take him back as his berth had been filled up.

The plaintiff then went to the deputy superintendent of the marine office at Lowestoft and made a complaint to him that he had been wrongfully prevented from rejoining the *Emily*. The deputy superintendent heard the plaintiff's story and decided against his contention.

The plaintiff subsequently brought this action against the owner of the *Emily* claiming a declaration that he had been wrongfully discharged from his employment on the *Emily*, and damages. The defence to the action was (1.) that the plaintiff had discharged himself and (2.) that the deputy superintendent's decision on the plaintiff's complaint was, under s. 387 of the Merchant Shipping Act, 1894 (1), final and binding on the plaintiff.

The county court judge gave judgment for the plaintiff. He found as a fact that the plaintiff had not discharged himself, and he further held that the act of the deputy superintendent in adjudicating on the dispute was ultra vires and not final or binding on the defendant. The county court judge was of opinion that the powers conferred on a superintendent of a mercantile marine office by s. 387 of the Merchant Shipping Act, 1894, to adjudicate in a dispute of this kind are not conferred on a deputy superintendent by s. 247.

---

(1) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 247: "(1.) It shall be the general business of superintendents of mercantile marine offices (in this Act referred to as superintendents) . . . . to superintend and facilitate the engagement and discharge of seamen in manner in this Act provided: . . . . and to perform such other duties relating to seamen, apprentices, and merchant ships as are by or in pursuance of this Act, or any Act relating to merchant shipping, committed to them.

"(2.) Any act done by to or before a deputy duly appointed shall have the same effect as if done by to or before a superintendent."

Sect. 387: "(1.) A superintendent shall inquire into, hear, and determine any dispute, either between the owner of a fishing boat and the skipper or a seaman of the boat, or between the skipper of a fishing boat and any seaman of the boat concerning—

(i.) the skipper's or seaman's wages or his share in the profits of the voyage or trip or a fishing catch, or any deduction therefrom; or

(ii.) the skipper's or seaman's engagement, service, or discharge; or

(iii.) the cost, quantity, or quality, of the provisions supplied to the crew;

if any party to the dispute calls upon him to decide it, and his decision thereon shall be final and binding on all persons."

1914

MAYHEW *v.* TRIPP.

Dodson, for the defendant. The effect of s. 247, sub-s. 2, of the Merchant Shipping Act, 1894, is that a deputy superintendent has power to do everything that a superintendent can do, including the decision under s. 387 of disputes between the owner of a fishing boat and a seaman as to the latter's discharge.

Eversley, for the plaintiff. The plaintiff's claim in this action in respect of his alleged wrongful discharge by the defendant is not a dispute concerning his discharge within the meaning of s. 387, and therefore even a superintendent would have had no power to hear and determine the dispute under that section. The question was not whether the plaintiff had been properly discharged, but whether he had been discharged at all. Secondly, assuming a superintendent would have had jurisdiction to act in the matter under s. 387, a deputy had no power to do so. A person who is clothed by statute with ministerial or executive powers cannot in the absence of express authority execute those powers by a deputy. The only section in the Act authorizing a deputy to act for a superintendent is sub-s. 2 of s. 247. That authority only extends to matters coming within the general business of superintendents as speciefid in sub-s. 1 of that section, which are of a comparatively trivial administrative character and do not include the discharge of judicial functions such as are conferred by s. 387. Further, s. 247 is in Part II. of the Act, and s. 387 is in Part IV. Sect. 263 provides that the provisions of Part II. of the Act relating, inter alia, to "(*g*) the decision of questions by the superintendent when referred to him" shall not apply to any fishing boats or the crews thereof. The effect of this provision is to restrict the powers given to a deputy by s. 247 to matters dealt with in Part II. and prevents him from acting in the matter of a dispute under s. 387. Lastly, the county court judge has not found as a fact that the deputy superintendent did hear and determine the questions in dispute in this action.

LUSH J. This case raises a question, which we are told is one of considerable importance, as to the power of a deputy superintendent of a mercantile marine office to do what a superintendent himself can undoubtedly do, namely, to adjudicate upon a dispute between the owner of a fishing boat and a fisherman who complains of having been wrongfully discharged from his employment on the boat. The plaintiff in this action claimed a declaration that he had been wrongfully discharged from his employment on the defendant's fishing boat, and damages. The defence to the action was that the matter was res judicata, because the questions in dispute between the parties had been inquired into by a deputy superintendent whose decision was adverse to the plaintiff and was final. The plaintiff's answer to this defence was twofold. In the first place, it was said that the deputy superintendent had not in fact adjudicated upon the dispute, and, secondly, that the deputy superintendent had no jurisdiction to do so.

With regard to the first question, I think, though with some doubt, that the county court judge has found as a fact, and that there was evidence on which he could find, that the deputy superintendent did adjudicate upon the dispute. On the second question, as to the powers of a deputy superintendent, which is a question of law, the county court judge decided in favour of the contention of the plaintiff that the deputy superintendent had no power to adjudicate upon the dispute. The question depends on the true construction of certain sections of the Merchant Shipping Act, 1894. Sect. 387 empowers a superintendent to hear and determine any dispute between the owner of a fishing boat and a seaman of the boat concerning certain specified matters, including the seaman's "engagement, service, or discharge." Then, in order to ascertain what powers are conferred upon a deputy superintendent I turn to s. 247, sub-s. 1 of which confers certain general powers upon superintendents, and sub-s. 2 provides that "any act done by to or before a deputy duly appointed shall have the same effect as if done by to or before a superintendent." I ought to mention, as the plaintiff relies on this, that s. 387 occurs in Part IV. of the Act, which deals with "Fishing Boats," whereas s. 247 is in Part II., which deals with "Masters and Seamen," but I cannot find anything in the Act to support the contention that the powers conferred upon a deputy by sub-s. 2 of s. 247 can only be exercised by him in dealing with matters which come within Part II. and that his jurisdiction does not extend to matters which are dealt with in Part IV. On the contrary, one would naturally suppose that the deputy was intended to act whenever the superintendent himself was unable to do so, and, so far from sub-s. 2 of s. 247 in any way limiting or qualifying the powers of the deputy, the language of the sub-section is quite general and authorizes the deputy to do any act which the superintendent himself may do. It would be highly inconvenient if it were not so, because the very object of s. 387 is to give seamen employed on fishing boats an opportunity of obtaining an expeditious and economical settlement of disputes between them and the owners of the boats in which they are employed. This view obtains support from a consideration of the matters dealt with in s. 387. For example the section refers to disputes as to the quantity or quality of the provisions supplied to the crew. That is clearly a matter which can be determined very readily by a person who has an opportunity of inspecting the food and it does not require a formal investigation by means of a county court action. It would be very inconvenient if a deputy could not deal with a matter of that sort in the absence of the superintendent. In my opinion, therefore, sub-s. 2 of s. 247 gives to the deputy the same powers as are possessed by a superintendent unless there is some other section of the Act which restricts those powers. Mr. Eversley contends that s. 263 has that effect. Sub-s. 2 of s. 263 provides that the provisions of Part II. relating to certain matters, including "(*g*) the decision of questions by the superintendent when referred to him," shall not apply to any fishing boats or to the owners, shippers, and crews thereof. I cannot see how that section in any way affects the provisions of s. 387, which is in Part IV. of the Act, nor does it in my opinion in any way restrict the general powers conferred upon a deputy superintendent by sub-s. 2 of s. 247.

I am therefore of opinion that the deputy superintendent had jurisdiction to adjudicate upon the matters in dispute between the plaintiff and the defendant; and this appeal must be allowed.

ATKIN J. I am of the same opinion. The plaintiff brought this action in consequence of his having been, as he alleges, wrongfully discharged from his employment as a fisherman on board the defendant's fishing boat. The defendant gave notice of a statutory defence, namely, that he relied on the provisions of the Merchant Shipping Act, 1894. The provisions of that Act are contained in 748 sections, and I think it might very well have been contended that the notice was defective in that it did not specify the particular sections relied on. That point, however, was not taken. The section actually relied on was s. 387, and it was said that the dispute between the parties had been adjudicated upon under that section. The county court judge held that the person who was said to have determined the question had no jurisdiction to do so, because he was not a superintendent but only a deputy. It was further contended before us that even a superintendent had no power under s. 387 to determine the particular question which was in dispute in this case, namely, a claim in respect of an alleged wrongful discharge. I think that the language of s. 387, sub-s. 1, does include a dispute as to whether the discharge of a fisherman was wrongful and as to what amount of compensation, if any, ought to be paid to him. Therefore it was within the jurisdiction of a superintendent to adjudicate upon this dispute. A deputy superintendent derives his powers from sub-s. 2 of s. 247, which provides that "any act done by to or before a deputy duly appointed shall have the same effect as if done by to or before a superintendent." I think that that sub-section gave power to the deputy to hear and determine the dispute in this case under s. 387. But it has been contended that the effect of s. 263 is to prevent the application of Part II. of the Act to fishing boats, and that as s. 247 is in Part II., the powers given to a deputy by sub-s. 2 cannot be exercised with regard to a matter arising under s. 387, which is in Part IV., and that the only persons who can act under s. 387 are superintendents because the section expressly authorizes them to do so. I do not think that contention is well founded. Sects. 246 to 250 are a group of sections dealing in general terms with the powers and duties of superintendents, and that group of sections contains no provisions relating to the special matters which are referred to in sub-s. 2 of s. 263. I do not find anything in s. 263 to restrict the power given to a deputy by s. 247 of doing whatever a superintendent may do.

Appeal allowed.

Solicitors for plaintiff: *Gibson & Weldon, for Atkins, Lowestoft.*

Solicitors for defendant: *Botterell & Roche, for Chamberlin, Talbot & Bracey, Lowestoft.*

F. O. R.

FAIRBANKS *v.* THE FLORENCE COAL AND IRON COMPANY, LIMITED.

1914
Feb. 10.

Mine—Coal Mine—Minimum Wage—Wages exceeding Minimum—Regularity and Efficiency—District Rules—Action for Wages—Condition Precedent—Coal Mines (Minimum Wage) Act, 1912 (2 *Geo.* 5, *c.* 2), *s.* 1.

By s. 1, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, it is made an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to the workman wages at not less than the minimum rate settled under the Act and applicable to the workman, unless it is certified in manner provided by the district rules that the workman is a person excluded under the district rules from the operation of the sub-section or that the workman has forfeited the right to wages at the minimum rate by reason of his failure to comply with the conditions laid down by those rules with respect to the regularity or efficiency of his work. By sub-s. 2 the district rules are to lay down conditions with respect to the regularity and efficiency of the work and to provide that a workman shall forfeit the right to wages at the minimum rate if he does not comply with the conditions, except as therein mentioned. The district rules are also to provide for the persons by whom and the mode in which any question whether a workman is one to whom the minimum rate of wages is applicable, or whether a workman has complied with the conditions laid down by the rules, or whether a workman who has not complied with those conditions has forfeited his right to wages at the minimum rate, is to be decided. District rules were duly made under this enactment.

A miner was employed at a rate of wages exceeding the minimum rate settled under the Act and consisting of the minimum rate increased by a sum per day payable through the action of a conciliation board and by a further sum payable by the custom of the district to miners in his position. He sued his employers in the

1914

FAIRBANKS
v.
FLORENCE
COAL AND
IRON
COMPANY,
LIMITED.

county court to recover six days' wages. The employers claimed to make a deduction from the wages on the ground that the miner had failed to comply with the conditions with respect to regularity and efficiency laid down by the district rules. It was not disputed that if the case was within the Act the miner had no cause of action until the dispute had been decided as provided by the district rules:—

Held, that the case was within the Act, notwithstanding that the rate of wages exceeded the minimum rate as settled under the Act.

APPEAL from the county court of Staffordshire holden at Longton.

The claim was by a collier for 2*l.* 6*s.* 6*d.*, being six days' wages at 7*s.* 9*d.* a day alleged to be due to him from the defendants, his employers. They claimed to be entitled to make a deduction from the wages on the ground that the plaintiff had failed to comply with the conditions as regards regularity and efficiency of work laid down by the joint district board, under s. 1, sub-s. 2, of the Coal Mines (Minimum Wage) Act, 1912. (1)

---

(1) Coal Mines (Minimum Wage) Act, 1912 (2 Geo. 5, c. 2), s. 1, sub-s. 1: "It shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum rate settled under this Act and applicable to that workman, unless it is certified in manner provided by the district rules that the workman is a person excluded under the district rules from the operation of this provision, or that the workman has forfeited the right to wages at the minimum rate by reason of his failure to comply with the conditions with respect to the regularity or efficiency of the work to be performed by workmen laid down by those rules; and any agreement for the payment of wages in so far as it is in contravention of this provision shall be void.

"For the purposes of this Act, the expression 'district rules' means rules made under the powers given by this Act by the joint district board."

Sub-s. 2: "The district rules . . . . shall lay down conditions with respect to the regularity and efficiency of the work to be performed by the workmen, and with respect to the time for which a workman is to be paid in the event of any interruption of work due to an emergency, and shall provide that a workman shall forfeit the right to wages at the minimum rate if he does not comply with conditions as to regularity and efficiency of work, except in cases where the failure to comply with the conditions is due to some cause over which he has no control.

"The district rules shall also make provision with respect to the persons by whom and the mode in which any question, whether any workman in the district is a workman to whom the minimum rate of wages is applicable, or whether a workman has complied with the conditions laid

They contended that in these circumstances the county court had no jurisdiction, but that the amount due to the plaintiff must be fixed according to the district rules. (1) They tendered

---

down by the rules, or whether a workman who has not complied with the conditions laid down by the rules has forfeited his right to wages at the minimum rate, is to be decided, and for a certificate being given of any such decision for the purposes of this section . . . ."

(1) The following rules of the North Staffordshire Joint District Board bear on the matter of the minimum wage:—

" 1. For the purposes of s. 1, sub-s. 2, of the Act, there shall be local joint committees, consisting of two representatives of the employers and two representatives of the workmen (selected from time to time as occasion may arise from the joint district board by the president and vice-president), who in case they disagree shall call in a chairman, whose decision shall be final . . . ."

" 4. A local joint committee shall, when reference is made to it, decide (*a*) whether a workman is one to whom the minimum rate is applicable, (*b*) whether the workman has complied with the conditions laid down by the rules, and (*c*) whether he has or has not forfeited his right to wages at the minimum rate."

" 7. A workman who fails in any week to duly attend 80 per cent. of his available working days shall forfeit for that week the right to wages at the minimum rate (unless his attendance is prevented by illness or accident) and be paid at his existing contract rate.

" If any workman voluntarily ceases work, or leaves his working place before the proper time at the end of his shift, the proportion of the payment for the time so lost shall be deducted from the amount of his minimum wage for that shift.

" 8. If a workman working at contract rates, in consequence of his own disregard of instructions, breach of colliery rules, or other wilful act or default is prevented from earning an amount equal to his minimum wage, he shall forfeit the right to the minimum wage until any defect arising from such act or default has been remedied."

" 10. Where a contractor or a piece worker does not perform the amount of work which calculated at the agreed rates would amount to the minimum wage he shall not receive the minimum unless the deficiency is due to any cause for which he is not responsible, as for example, faults, bad roof, falls, water or other unusual conditions."

" 12. In the case of a piece worker or a contractor employing other workmen, the owners shall only be responsible for the payment of the amount of wages at the minimum rates to the contractors and workmen employed by them, but this is without prejudice to the right of the workman to be paid by the contractor the agreed rates.

" 13. In any case where causes of a temporary nature (as for example holing up new drifts, or driving of cruts or tunnels) reduce the amount payable to a contractor to a sum below the minimum rate, any sums paid to bring the earnings up to the minimum shall be treated as advances or payments on account,

1914

FAIRBANKS v. FLORENCE COAL AND IRON COMPANY, LIMITED.

the amount which they contended was justly due to the plaintiff, and which was less than the sum of six days' wages at the minimum rate settled under the Act. The plaintiff refused to accept the amount tendered.

The plaintiff was a buttocker, i.e., a collier working at a certain part of the face of the mine and entitled by the custom of the colliery to an amount of 6*d.* a day more than other colliers. The wages in the district were fixed by the joint district board at 7*s.* a day for contracting colliers, and at 6*s.* 6*d.* per day for colliers other than contracting colliers. These rates had been increased to 7*s.* 3*d.* a day in either case by the conciliation board acting in the district. The plaintiff as a buttocker would be entitled to 6*d.* a day more than this, i.e., to 7*s.* 9*d.* a day, apart from the question raised by the defendants as to whether he was bound to comply and had complied with the conditions as to regularity and efficiency of work.

The plaintiff and another man had previously to the dispute been contracting colliers in a place known as Place No. 91. Some weeks before the dispute the plaintiff was asked to work at Place No. 92 and went to work there, his mate continuing for some time to work at place No. 91. No special arrangement as to terms was made when the change took place. The minimum wage was not earned at Place No. 92. At the hearing in the county court several weekly bills were produced shewing sums added each time by the employers called "consideration to make up wages." These sums were handed to the plaintiff to enable him to pay the men working under him the minimum wage and to pay himself as a buttocker the sum of 7*s.* 9*d.* a day. After stating certain facts the judgment of the county court judge proceeded as follows: "The minimum wage fixed for the district was six shillings and six pence a day for miners; but by the action of the conciliation board wages paid

---

to be deducted from subsequent earnings when such earnings are in excess of the minimum. Provided always that such deductions shall not exceed the amount of the advances made and shall not during any week reduce the daily wage below the minimum rate.

"This rule shall not be held to cover any exceptional conditions such as faults or defects of a similar nature." . . . .

in North Staffordshire are slightly higher in every case than this. It was argued for the plaintiff that, as he did not receive the minimum wage fixed by the board, but something higher, the wages board"—i.e., the joint district board—"has no jurisdiction, although in the present case the employers refused to pay even the minimum wage. It is admitted that if the plaintiff had been receiving the statutory minimum wage the dispute in this case must go before the wages board for them to determine whether or not the plaintiff had forfeited this wage by not complying with the conditions as to regularity and efficiency of work. I was of opinion that at the time the dispute arose the plaintiff was working by the day at the customary minimum wage for buttockers, and that the Act contemplated a minimum wage fixed by custom of the colliery somewhat higher than the statutory minimum wage, and intended that in such a case the wage is to be treated as the minimum wage for the purposes of the Act. I thought that the plaintiff was in reality being paid at the time the minimum statutory wage plus six pence a day added by custom. If the minimum wage board lost its jurisdiction the moment the wages paid at a colliery are by custom even a fraction above those fixed by the minimum wage board as the minimum for the district, then in North Staffordshire it has lost already its jurisdiction to inquire into cases where the minimum wage has not been paid. I was of opinion that the Minimum Wage Act, 1912, intended such a dispute as existed in the present case to go before the wages board. I accordingly nonsuited the plaintiff."

The plaintiff appealed.

Langdon, K.C., and *W. Allen*, for the plaintiff. The county court judge was wrong in holding that his jurisdiction was ousted in this case by s. 1, sub-s. 2, of the Coal Mines (Minimum Wage) Act, 1912. The present case is not within the Act. It is the ordinary case of a contract between employer and workman at a rate of wages fixed by the contract and not fixed by the Act. The terms of the Act are that it shall be an implied term of every contract that the employer shall pay to the workman wages

1914

FAIRBANKS
v.
FLORENCE
COAL AND
IRON
COMPANY,
LIMITED.

at not less than the minimum rate. If by the express terms of the contract the employer is to pay the minimum wage, or more than the minimum wage, the implied term with all its conditions and qualifications specified in sub-s. 2 is excluded. Expressum facit cessare tacitum. The minimum wage is a statutory wage which only comes into existence when the contract between employer and workmen is, and to the extent to which it is, in contravention of the terms of the Act. The defendants in this case seek to introduce all the conditions and qualifications affecting the minimum wage into a contract which is outside the Act altogether. It is no part of the contract between these parties that the workman shall go before a joint district board for them to inquire whether he has been a regular and efficient workman.

Greer, K.C., and *Jowitt*, for the defendants. The county court judge has found that the plaintiff's wages consisted of the minimum wage plus 6*d.* a day. That introduces all the qualifications affecting the minimum wage. That being so, there is no cause of action until the dispute has gone before the joint district board: *Randle* v. *Clay Cross Co.* (1)

BANKES J. This is an appeal from the county court judge of Longton, who held that there was no cause of action and non-suited the plaintiff. The dispute was between a collier and his employers as to whether the employers were entitled to make a certain deduction from the collier's wages because of want of regularity and efficiency in the man's work. The employers contended that a dispute of this nature must be decided in the manner indicated by the rules made under the Coal Mines (Minimum Wage) Act, 1912, and that the county court was not a competent Court to deal with it. There was some confusion in the county court with reference to the phrase "contracting collier," due probably to the sense in which the word contract is used in the phrase "contract rate." In this coalfield rules had been made by the North Staffordshire Joint District Board, and that board or the arbitrator appointed by them had fixed a minimum rate of wages for the district. There was also a

(1) [1913] 3 K. B. 795.

conciliation board which had been applied to and had intervened and fixed a rate of wages. As the result of these agencies the plaintiff was entitled to wages at a rate in excess of the minimum wage fixed by the district rules, the difference being due partly to the custom of this colliery and partly to advances in the rate of wages due to the action of the conciliation board from time to time.

The argument for the plaintiff was that the Coal Mines (Minimum Wage) Act, 1912, or those provisions of it which impose upon the workman claiming the minimum wage under the Act certain obligations as to regularity and efficiency in his work, apply only to a man receiving the exact amount of the minimum wage, and that if, whether by arrangement with his employer, or by custom, or by action of the conciliation board, he receives an amount exceeding the minimum wage by as little as one penny a day, he may say that those provisions of the Act have no application to him and that the employer is to pay the minimum wage without any regard to the regularity or efficiency of the man's work. I do not agree with this contention. Assuming it possible for an employer and a workman to make a special arrangement that wages shall be at a certain rate in excess of the minimum wage and that none of the provisions of the Act shall apply, it would require very strong evidence to prove such an agreement. Where the difference between the minimum wage and the wage paid is made up by the local custom or by intervention of conciliation boards, the inference is that the difference consists of mere additions to the minimum wage. I think that the county court judge found that the plaintiff was a contracting collier and that he had a contract entitling him to sums beyond and in excess of the minimum wage. That he was a contracting collier within the meaning of the rules is plain, since he was employing men under him, and the weekly accounts between him and the defendants were made up of payments of the minimum wage to the men working under him and payment to himself at the rate of 7*s.* 9*d.* a day. The learned judge finds that "the minimum wage fixed for the district was six shillings and six pence a day for miners, but by the action of the conciliation board the wages paid in North Staffordshire are

1914

FAIRBANKS v. FLORENCE COAL AND IRON COMPANY, LIMITED.

Bankes J.

slightly higher in every case than this." In other words there was no special contract beyond the contract implied by law to pay the minimum wage and in addition the amount defined by the conciliation board. Later on in his judgment the learned judge said "I thought the plaintiff was in reality being paid at the time the minimum statutory wage plus six pence a day added by custom." Therefore the judgment must be read as finding that the plaintiff was in receipt of the minimum wage plus certain additions to which he was entitled. In these circumstances he has brought himself within the scope of the Coal Mines (Minimum Wage) Act, 1912, and has laid himself under certain obligations, one of which is that of submitting to the jurisdiction of the tribunal which must declare whether he is entitled, having regard to the regularity and efficiency of his work, to the sum which he claims. It has already been decided in *Randle* v. *Clay Cross Co.* (1) that in a dispute of this nature there is no cause of action which can be dealt with either in the county court, or in this Court on appeal from it, until the matter has been before the joint district board. This appeal must therefore be dismissed.

Avory J. I am of the same opinion. As to the jurisdiction of the county court I express no opinion, but simply follow the former decision of this Court, once it is decided that the case comes within the Coal Mines (Minimum Wage) Act, 1912. As to that question Mr. Langdon was logically forced to contend that a contract in express terms to pay the minimum wage plus 6*d.* per day is outside the Act. As soon as that was admitted the unsoundness of the argument was displayed. The result of it would be that the workman could sue for the minimum wage under the Act while the employer would not be entitled to the benefit of the provisions for regularity and efficiency of the work done. Sect. 1, sub-s. 2, of the Act is a statutory provision that the joint district boards shall lay down conditions as to regularity and efficiency of the work to be performed. The board in this case has laid down conditions, and any dispute as to whether a workman has complied with those conditions has to be decided by the board. We must assume that there is a bona fide dispute as to whether the plaintiff has complied with the conditions. It would be a strange conclusion that the county court should have jurisdiction to try the right to the minimum wage when it has no jurisdiction to say whether the employer is entitled to any deduction or set-off in respect of work done badly or not done at all.

---

(1) [1913] 3 K. B. 795.

Appeal dismissed.

Solicitors for appellant: *Stow, Preston & Lyttelton, for Hollinshead & Moody, Tunstall.*

Solicitor for respondents: *M. A. Orgill, for W. H. Breton, Longton.*

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.
1914
Feb. 6.

LEWIS *v.* G. DAVIES.

E. DAVIES, CLAIMANT.

Landlord and Tenant—Surrender of Tenancy—Tenant remaining in Possession —Execution—Claim by Landlord for Rent—8 Anne, c. 14, *ss.* 1, 6, 7— *County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 160.

Sects. 6 and 7 of 8 Anne, c. 14, enabling a landlord to distrain upon the goods of a tenant, still in possession, for rent in arrear upon a lease ended or determined, within six months after the determination of the same, are confined to cases between landlord and tenant and have no application to a case where the goods of a tenant under a subsisting tenancy are taken in execution at the suit of an execution creditor, so as to introduce into the operation of those sections, in favour of the person entitled to distrain thereunder, the advantages given by s. 1 of the statute to a landlord in the event of an execution on the goods of his tenant.

Sect. 160 of the County Courts Act, 1888, applies solely to s. 1 of the statute of Anne and does not extend in its operation to ss. 6 and 7 of that statute.

Decision of the Divisional Court (Channell and Bray JJ.) [1913] 2 K. B. 37 reversed.

Cox v. *Leigh* (1874) L. R. 9 Q. B. 333 approved.

APPEAL from the decision of a Divisional Court (1) reversing the decision of the judge of the county court of Pembrokeshire holden at Narberth.

(1) [1913] 2 K. B. 37.

The facts material for the purposes of this report are as follows:—

The defendant, who was the tenant of a farmhouse and land belonging to his father, by a document in writing surrendered his tenancy thereof on March 25, 1912, but the surrender was not to operate to release him from the arrears of rent due up to that date. The defendant gave up possession of the land, but was permitted by the landlord to continue to occupy the house without paying rent until such time as the landlord should require him to give up possession of it.

On July 9, 1912, certain goods in the house, which was still in the occupation of the defendant, were taken in execution in satisfaction of a judgment recovered against the defendant in the county court. Thereupon the landlord claimed, under s. 160 of the County Courts Act, 1888, and ss. 6 and 7 of 8 Anne, c. 14, to be paid out of the proceeds of the execution rent which had become due on March 25, 1912, under the former tenancy of the farmhouse and land.

The county court judge, thinking that the case was governed by the decision in *Wilkinson* v. *Peel* (1), held that a new tenancy of the farmhouse was created on March 25, 1912, and that therefore the right to distrain given by ss. 6 and 7 of 8 Anne, c. 14, did not apply, and gave judgment for the execution creditor. On appeal (1), the Divisional Court were of opinion that the case came within the decision in *Nuttall* v. *Staunton* (2), and that the defendant had not continued in possession of the house under a new tenancy, and held that the claim for rent was good as against the execution creditor.

From this decision the execution creditor appealed.

S. L. Porter, for the appellant. Three questions arise on this appeal. (1.) Was there a new agreement between the landlord and the tenant, or did the tenant remain in possession within the meaning of the statute of Anne? (2.) Whether the statute of Anne applies to cases where the tenancy determines by surrender, or only to cases where the tenancy ends by effluxion of time or notice to quit; and (3.) Does s. 6 of the statute of

(1) [1895] 1 Q. B. 516.

(2) (1825) 4 B. & C. 51.

Anne, or s. 160 of the County Courts Act, 1888, apply as between execution creditor and landlord or only as between landlord and tenant. If it applies only as between landlord and tenant, then the other questions will not arise.

The case of *Cox* v. *Leigh* (1), which was not referred to in the Court below, is a clear authority that s. 1 of the statute of Anne (2) is confined to an existing tenancy and is not to be extended in its operation to ss. 6 and 7 of that statute (3) so as to impose on an execution creditor in a case where there is a statutable power of distress the same obligation to pay a year's rent as if the term were still subsisting.

---

(1) L. R. 9 Q. B. 333.

(2) 8 Anne, c. 14, s. 1, provides that "from and after the 1st day of May, which shall be in the year of our Lord 1710, no goods or chattels whatsoever, lying or being in or upon any messuage, lands, or tenements, which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out shall before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution: provided the said arrears of rent do not amount to more than one year's rent, and in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment, as he might have done before the making of this act: and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent, as the execution money."

(3) By 8 Anne, c. 14 [18 in Rev. Stat.], s. 6, "And whereas tenants pur auter vie and lessees for years or at will frequently hold over the tenements to them demised after the determination of such leases, and whereas after the determination of such or any other leases no distress can by law be made for any arrears of rent that grew due on such respective leases before the determination thereof, it is hereby enacted that . . . . it shall and may be lawful for any person or persons having any rent in arrear, or due upon any lease for life or lives or for years or at will ended or determined, to distrain for such arrears after the determination of the said respective leases in the same manner as they might have done if such lease or leases had not been ended or determined."

Sect. 7: "Provided that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due."

It will be urged on the opposite side that there is a difference between s. 160 of the County Courts Act, 1888 (1), and s. 1 of the statute of Anne, but s. 160 is substituted for the earlier section in cases to which the latter would otherwise have applied, and s. 160 does not alter the rights of landlord and tenant, but merely provides simpler machinery for recovery of rent.

R. W. Turner, for the respondent. Sect. 160 of the County Courts Act, 1888, must be taken to apply where there is an existing right of distress in the landlord whether at common law or by statute; and *Cox* v. *Leigh* (2) was wrongly decided.

Sect. 1 of the statute of Anne put what may be called a stop order on the goods in the hands of the sheriff, and provided that one year's rent should be first paid. Sect. 6 says that the landlord, where the tenancy has determined, shall have power to distrain for arrears of rent in the same manner as he might have done if the lease had not been ended or determined, importing, by implication, that the words "with the same incidents and advantages" are to extend the operation of s. 1 to cases coming within s. 6. The statute of Anne was an Act for the benefit of landlords, and that is the only reasonable construction to put upon ss. 1 and 6.

---

(1) Sect. 160 of the County Courts Act, 1888, provides: "Section one of the Act of the eighth year of the reign of Queen Anne, chapter fourteen, shall not apply to goods taken in execution under the warrant of the Court, but the landlord of any tenement in which any such goods shall be so taken may claim the rent thereof at any time within five clear days from the date of such taking, or before the removal of the goods, by delivering to the bailiff or officer making the levy any writing signed by himself or his agent, which shall state the amount of rent claimed to be in arrear, and the time for and in respect of which such rent is due; and if such claim be made, the bailiff or officer making the levy shall, in addition thereto, distrain for the rent so claimed and the costs of such distress, and shall not within five days next after such distress sell any part of the goods taken unless they be of a perishable nature, or upon the request in writing of the party whose goods shall have been taken; and the bailiff shall afterwards sell such of the goods under the execution and distress as shall satisfy, first, the costs of and incident to the sale, next the claim of such landlord, not exceeding the rent of four weeks where the tenement is let by the week, the rent of two terms of payment, where the tenement is let for any other term less than a year, and the rent of one year in any other case, and lastly, the amount for which the warrant was issued; and if any replevin be made of the goods so taken, the bailiff shall, notwithstanding, sell such portion thereof as will satisfy the costs of and incident to the sale under the execution, and the amount for which the warrant issued; and in either event the overplus of the sale, if any, and the residue of the goods, shall be returned to the defendant, and the poundage of the high bailiff and broker for keeping possession, appraisement, and sale under such distress shall be the same as would have been payable if the distress had been an execution of the Court, and no other fees shall be demanded or taken in respect thereof."

(2) L. R. 9 Q. B. 333.

In the Court below Channell J. said that s. 160 of the County Courts Act, 1888, assumed the existence of a right of distress, and that being so, the respondent submits that it operates to a wider extent than does s. 1 of the statute of Anne, and has the effect of giving the respondent, who has a right of distress by virtue of s. 6 of the statute of Anne, the benefit of the machinery provided by s. 160.

Lord Reading C.J., after stating the preliminary facts, continued: On July 9, 1912, an execution was put in at the instance of the plaintiff, the execution creditor, on the goods of the defendant, who was at that time in possession of the farmhouse and buildings. On July 11 notice of the claimant's claim as lessor was given to the sheriff, and thereon an interpleader issue was directed.

The matter came before the county court judge, who, taking the view that he had to choose between the decisions in *Nuttall* v. *Staunton* (1) and *Wilkinson* v. *Peel* (2), adopted the views expressed in the more recent decision in *Wilkinson* v. *Peel* (2) and decided in favour of the execution creditor. That was the ground upon which the county court judge decided this case, and I say nothing here about the two cases of *Nuttall* v. *Staunton* (1) and *Wilkinson* v. *Peel* (2) as they are not material to the question which we are now deciding in this Court and we have not heard any argument upon them.

The Divisional Court adopted the view taken in the earlier case of *Nuttall* v. *Staunton* (1) and not that taken in *Wilkinson* v. *Peel* (2) and reversed the decision of the county court judge: the matter now comes before us on appeal from their decision.

Mr. Porter has taken the points which were argued in the

---

(1) 4 B. & C. 51.

(2) [1895] 1 Q. B. 516.

Court below, but he has added another point which he tells us was also taken but not argued as it has now been argued before us. It is whether s. 6 of the statute of Anne applies as between the landlord and an execution creditor seizing the goods of the tenant or whether it is to be confined to cases between landlord and tenant. Mr. Porter has urged the latter view and has further contended that s. 160 of the County Courts Act, 1888, has no application whatever to ss. 6 and 7 of the statute of Anne, and that if we come to that conclusion the other points which were argued in the Court below will not arise.

The view urged by Mr. Porter has been established by him to my satisfaction and is in my judgment conclusive of this appeal. He has put the case very clearly and concisely, and all that I propose—and all that it is necessary—to decide is that, when ss. 6 and 7 of the statute of Anne are examined, it is clear that they have no application to the case of a claim made by an execution creditor. The words of the sections are confined to cases which arise between landlord and tenant. The argument addressed to us against this view would involve the reading of s. 6 as if the words "and with the same incidents and advantages" were inserted after the words "in the same manner." It is not, in my opinion, possible for us so to read the section, and therefore I have come to the conclusion that ss. 6 and 7 do not apply in this case.

Sect. 1 of the statute of Anne is confined to the case where there is rent due for a period during a subsisting tenancy and an execution creditor has stepped in; and that section has no application to the present case.

Sect. 160 of the County Courts Act, 1888, applies solely to s. 1 of the statute of Anne. It begins thus: "Section one of the Act of the eighth year of the reign of Queen Anne, chapter fourteen, shall not apply to goods taken in execution under the warrant of the Court." In my opinion s. 160 is confined in its operation to the effect of s. 1 of the statute of Anne, and is not to be extended to ss. 6 and 7 of that statute.

The result is that this appeal succeeds.

Buckley L.J. The question which has been argued before us is this. In March, 1912, a surrender was executed between father and son which brought to an end a tenancy which had been existing between them. There remained arrears of rent unpaid.

Under ss. 6 and 7 of the statute of Anne there existed in the father a continuing right to distrain the son's goods during six months from March 25, the day of the surrender. Within the six months a judgment creditor of the son issued execution against him and certain goods were seized. On that there arises this question: are the advantages which by s. 1 of the statute of Anne are introduced in favour of the lessor of a subsisting lease introduced in favour of the person who under ss. 6 and 7 is entitled to distrain after the determination of a lease? In my opinion they are not.

Sect. 1 of the statute of Anne is a section which restricts and affects a legal right to distrain. It creates in the execution creditor who desires to seize goods under process of the Court a liability to pay the landlord of a subsisting lease arrears not exceeding one year's rent as the price of being allowed to issue execution. No goods or chattels are to be liable to be taken by virtue of any execution "unless the party at whose suit the said execution is sued out shall before the removal of such goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution: provided the said arrears of rent do not amount to more than one year's rent." The section ends by saying that when the landlord or his bailiff has been paid one year's rent the party at whose suit the execution is sued out "may proceed to execute his judgment, as he might have done before the making of this act; and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent, as the execution money." So that the execution creditor adds the rent which he has to pay to the amount of his judgment. That is the effect of s. 1.

Sects. 6 and 7 are not addressed to imposing on the execution creditor any such liability. They enlarge the right of lessors to distrain and create a right of distress within a limited time after the determination of the lease, and the lessors are to have the remedy "in the same manner as they might have done if such lease or leases had not been ended or determined." So that by virtue of those sections a right to distrain which did not theretofore exist is to exist after the term has determined.

The question we have to determine is, whether in those cases in which the landlord of the determined lease is exercising this enlarged power there is any liability or obligation upon the execution creditor to pay one year's rent with a right to add it to his debt. The answer is, there is not. The statute does not so provide.

Then with regard to s. 160 of the County Courts Act, 1888, the operation of that section is to exclude s. 1 of the statute of Anne in cases within s. 160, and to substitute certain other provisions. It provides that: "Section one of the Act of the eighth year of the reign of Queen Anne, chapter fourteen, shall not apply to goods taken in execution under the warrant of the Court," and then proceeds to enact that such cases are to be dealt with under the provisions of s. 160, which are, in effect, substituted for the provisions of s. 1 of the statute of Anne in respect of goods taken in execution under the warrant of a county court. Sec. 160 has no application to a case falling within ss. 6 and 7.

For these reasons I am of opinion that the appeal must succeed.

PHILLIMORE L.J. I am of the same opinion. The cases of *Nuttall* v. *Stanton* (1) and *Wilkinson* v. *Peel* (2)—and this present case as really decided in the Court below—turn upon the construction and application of ss. 6 and 7 of the statute of Anne, and have no bearing on the question whether the remedies given under s. 6 can be cumulated with the remedies given under s. 1 of that Act. That matter was decided in *Cox* v. *Leigh* (3), and although that decision is not binding upon us it is a decision which commends itself to us and which we think correct.

Sect. 6 of the statute of Anne starts by saying: "And whereas tenants pur auter vie and lessees for years or at will frequently

(1) 4 B. & C. 51.
(2) [1895] 1 Q. B. 516.
(3) L. R. 9 Q. B. 333.

C. A.
1914

LEWIS
v.
DAVIES.

Phillimore L.J.

hold over the tenements to them demised, after the determination of such leases, and whereas after the determination of such or any other leases no distress can by law be made for any arrears of rent that grew due on such respective leases before the determination thereof," and then it gives a power to distrain for rent within six months, the period being so limited by s. 7.

Sect. 1 deals with cases where the premises are in lease to, or occupied by, a tenant and does not give any power to distrain, but says that the execution creditor shall pay the landlord any rent then due. There is no reason for importing into the conditions of s. 1 an obligation on the execution creditor to pay any rent then due in respect of a tenancy which had determined—remembering that the landlord himself might have distrained under s. 6.

I think that the decision in *Cox* v. *Leigh* (1) is right and decides this case. Unfortunately this point, although we are told that it was taken in the Court below, was not pressed home in that Court. But incidentally s. 160 of the County Courts Act, 1888, was noticed, and I should gather that the Court thought that the rights were not different under the two sections.

No doubt if the long paragraph in s. 1 of the statute of Anne beginning at "but the landlord of any tenement" and going down to the end of the section could be treated as a separate enactment it might be said perhaps that new and additional rights had been given to the landlord; but that is not the way to read the section. The effect of the section is to introduce a substituted mode of procedure in the cases to which the section applies for the procedure enacted by s. 1 of the statute of Anne. In my judgment the appeal must succeed.

Appeal allowed.

Solicitors for appellant: *G. L. Matthews & Co., for Lewis & James, Narberth.*

Solicitors for execution creditor: *Holt Beever & Crowdy, for Lascelles & Lewis, Narberth.*

R. M.

---

(1) L. R. 9 Q. B. 333.

1914
Feb. 27 ;
March 2.

WILLIAMS *v.* WALLIS AND COX.

Landlord and Tenant—Agricultural Holding—Claims by Landlord and Tenant —Arbitration—Rejection of Evidence by Arbitrator—Application to County Court to set Award aside on Ground of "Misconduct"—Competency of Appeal to Divisional Court—Agricultural Holdings Act, 1908 (8 *Edw.* 7, *c.* 28), *ss.* 13, 30, 43 ; *Sched. II.*

An appeal lies to a Divisional Court under s. 120 of a County Courts Act, 1888, from the decision upon any question of law of a county court judge in hearing an application to set aside an award under the Agricultural Holdings Act, 1908.

Rejection of evidence by an arbitrator may constitute "misconduct" on his part entitling the party aggrieved to have the award set aside.

Appeal by Edwin Williams from a decision of the deputy county court judge sitting at Hereford.

By an indenture dated June 1, 1906, a farm was demised to the appellant Williams by the respondents' predecessor in title, for seven years. By the lease the appellant covenanted (inter alia) to keep the premises demised "in as good and tenantable repair and condition as they now are," and to deliver them up to the lessor at the expiration of the term "in such good and tenantable repair and condition as aforesaid, and in such state and condition as shall be consistent with the due performance of the covenants herein contained."

At the expiration of the lease the appellant claimed to be entitled to compensation in respect of improvements, and the lessor claimed against the appellant in respect of breaches of covenant, and these claims came before an arbitrator appointed by the Board of Agriculture and Fisheries under the Agricultural Holdings Act, 1908. In the arbitration proceedings the arbitrator, according to the appellant's allegation, refused to admit evidence tendered by the appellant as to the condition of the premises at the commencement of the term. On the award being made the appellant applied to the county court of Hereford under the provisions of the Agricultural Holdings Act, 1908, to set the award aside, on the ground of misconduct on the part of the arbitrator, the misconduct alleged being the rejection of he evidence tendered by the appellant as above stated.

The application came before the deputy county court judge, and evidence was given on one side that the arbitrator had excluded the evidence referred to, and on the other that he had not excluded it. The deputy county court judge held that it was not necessary to decide whether in fact that evidence was excluded or not, as he was of opinion that even if the arbitrator excluded it that did not amount to misconduct entitling the judge to set the award aside. The deputy county court judge accordingly dismissed the application, whereupon this appeal was brought.

Geoffrey Lawrence, for the respondents. There is a preliminary objection to the hearing of this appeal. The right of appeal is always the creation of statute, and unless it is expressly given, it does not exist: *Attorney-General* v. *Sillem.* (1) The procedure in connection with an application to set aside an award made under the Agricultural Holdings Act, 1908, is prescribed by that Act and the Second Schedule, and there is no provision for an appeal to the Divisional Court. By s. 13, sub-s. 3, of the Act the arbitrator is empowered to state a case for the opinion of the county court on any question of law, and the opinion of that Court is to be final, unless either party appeals to the Court of Appeal. In this case no application was made for a case to be stated. By s. 30 certain matters may be determined by the county court or by a Court of summary jurisdiction, and an appeal is expressly given from the decision of the latter Court to a Court of quarter sessions, but no mention is made of any appeal from the county court. Further, s. 43 enacts that an order of the county court or of a Court of summary jurisdiction under this Act shall not be quashed for want of form, or be removed by certiorari or otherwise into any superior Court. Those provisions shew that no appeal was contemplated except to the Court of Appeal from the decision of a county court on a case stated, or to a Court of quarter sessions from the decision of a Court of summary jurisdiction.

[ATKIN J. Order XL., r. 4 (14.), of the County Court (Agricultural Holdings) Rules says that the procedure on an application in the county court under the Act is to be the same as in an ordinary action in the county court.]

---

(1) (1864) 10 H. L. C. 704.

If no appeal is given by the Act, the rules made under it cannot give a right of appeal. [*Neptune Steam Navigation Co.* v. *Sclater, The Delano* (1) was referred to.]

LUSH J. We shall hear the appeal before deciding this preliminary point.

H. G. Farrant, for the appellant. The rejection of evidence tendered by the appellant on a material issue amounted to misconduct on the part of the arbitrator entitling the appellant to have the award set aside under s. 13 of the Second Schedule to the Agricultural Holdings Act, 1908. That section provides that "when an arbitrator has misconducted himself, or an arbitration or award has been improperly procured, the county court may set the award aside." The word "misconduct" does not necessarily mean personal misconduct, and no personal misconduct is suggested here; but there was misconduct in the conduct of the arbitration proceedings. The evidence tendered was clearly material in view of the provisions of the lease requiring the appellant to keep the demised premises "in as good and tenantable repair and condition as they now are." It was essential for the appellant to shew the condition of the premises in 1906. [He cited *Phipps* v. *Ingram*. (2)]

Geoffrey Lawrence, for the respondents. There was no "misconduct" on the part of the arbitrator even assuming the fact to be that he rejected the evidence tendered by the appellant. All questions of law and fact have to be decided by the arbitrator, and his decision on questions of law may be questioned on a case stated by him, but not otherwise. The rejection of evidence is a decision on a matter of law, and even if it is decided erroneously that is no ground for setting aside the award.

LUSH J. The first question for our decision is whether there is a right of appeal in this case at all. What happened was this: Claims by a landlord against his tenant and by the tenant against

(1) [1895] P. 40.

(2) (1835) 3 Dowl. 669.

his landlord under the Agricultural Holdings Act, 1908, were referred to arbitration. The arbitrator made an award, and an application was then made in the county court to set the award aside upon the ground of misconduct on the part of the arbitrator. The deputy county court judge refused to set aside the award, and the question is whether an appeal lies from his decision. Mr. Lawrence for the respondents contended that under the special circumstances of this case there is no right of appeal, and he bases his contention upon certain provisions of the Agricultural Holdings Act, 1908. Sect. 13, sub-s. 1, requires all questions which under the Act or under the contract of tenancy are referred to arbitration to be determined by a single arbitrator in accordance with the provisions of the Second Schedule. Sub-s. 3 of the same section says that "If in any arbitration under this Act the arbitrator states a case for the opinion of the county court on any question of law, the opinion of the Court on any question so stated shall be final, unless within the time and in accordance with the conditions prescribed by rules of the Supreme Court either party appeals to the Court of Appeal, from whose decision no appeal shall lie," and then sub-s. 4 says that the Arbitration Act, 1889, is not to apply to any arbibration under the Act. The procedure, therefore, in the case of an arbitration under the Agricultural Holdings Act, 1908, is quite different from the procedure in an ordinary arbitration. The case stated by an arbitrator goes to the county court judge and his decision is to be final unless certain conditions are complied with, and if they are, the further appeal goes, not to this Court as it would under s. 120 of the County Courts Act, 1888, but to the Court of Appeal. We were then referred by Mr. Lawrence to s. 30, sub-s. 1, which provides that in the case of certain disputes they may be heard by the county court or by a Court of summary jurisdiction, and such Courts are empowered to make certain orders. Then sub-s. 2 of the same section enacts that "Any such dispute shall be deemed to be a matter in which a Court of summary jurisdiction has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Acts; but any person aggrieved by any decision of a Court of summary jurisdiction under this section may appeal to a Court of quarter sessions." Sect. 43, to which Mr. Lawrence also referred, says that "An order of the county court or of a Court of summary jurisdiction under this Act shall not be quashed for want of form, or be removed by certiorari or otherwise into any superior Court." Lastly we were referred to the Second Schedule to the Act, which contains a code of rules with regard to arbitrations, and there we find these two provisions: "the award to be made by the arbitrator shall be final and binding on the parties and the persons claiming under them respectively" (s. 11); and "when an arbitrator has misconducted himself, or an arbitration or award has been improperly procured, the county court may set the award aside" (s. 13). There is nothing there to suggest that the county court judge, if he is asked to set aside an award on the ground of misconduct on the part of the arbitrator, is exercising a limited authority or power created by the Agricultural Holdings Act, 1908; and there is nothing which says that his decision is to be final, or what is to happen if one of the parties desires to appeal. It is not said either that his decision is to be final or that it is not to be final. If we turn to Order XL., r. 4, of the County Court (Agricultural Holdings) Rules, which deals with applications for the removal of an arbitrator or for the setting aside of an award, we find that clause 14 provides that "Subject to the special provisions of this rule, the procedure on an application shall be the same as the procedure in an action commenced in the Court by plaint and summons in the ordinary way, and determined by the judge without a jury; and the statutory provisions and rules for the time being in force relating to such actions shall, with the necessary modifications, apply to such application accordingly; and in the application of such provisions and rules the application shall be deemed to be a summons with particulars annexed, the day fixed for proceeding with the application shall be deemed to be the return day, and the applicant and respondents shall be deemed to be plaintiff and defendants respectively." The question is whether, in giving a judgment upon an application to set aside an award on the ground of misconduct on the part of the arbitrator, the deputy county court judge was acting as a county court judge in the exercise of his ordinary jurisdiction as such so that s. 120 of the

County Courts Act, 1888, applies to his judgment, or whether he was exercising a limited jurisdiction created by the Agricultural Holdings Act, 1908, to which we ought, having regard to its provisions, to annex the condition that s. 120 of the County Courts Act, 1888, is not applicable. I do not think that s. 43 of the Agricultural Holdings Act, 1908, upon which reliance was placed by Mr. Lawrence, has any bearing upon the question we have to decide. To remove an order of the county court by certiorari in order to quash it is quite a different thing from appealing against it, and when we look at the Second Schedule of the Act of 1908, unfettered as it is with regard to the power of the county court judge to set aside an award, it seems to me, notwithstanding those provisions of the Act upon which Mr. Lawrence relied, that in hearing this application the deputy county court judge was acting in the exercise of the ordinary jurisdiction of a county court judge, and that Order XL., r. 4 (14.), which I have read, indicates that any judgment given by him upon such an application as this is to be treated as a judgment given by him qua county court judge. The consequence of that is that s. 120 of the County Courts Act, 1888, applies and an appeal lies from a decision given by him on such an application which is erroneous in point of law, precisely in the same way as if the judgment had been given in an ordinary county court action. We were referred to the decision in *Neptune Steam Navigation Co.* v. *Sclater, The Delano.* (1) In my opinion that decision does not assist us. It was a judgment given upon a different point, the question there being whether s. 120 of the County Courts Act, 1888, applied so as to give an appeal in an admiralty action under a statute prior in date to the County Courts Act, 1888. For the reasons I have given, the preliminary objection fails.

On the main question Mr. Farrant contended that the deputy county court judge gave an erroneous decision in point of law. He said that the question before the arbitrator was whether the landlord could establish that the condition of the demised premises was worse when the tenant went out than when he entered in 1906. That question was vital to the issue the arbitrator had to decide, and it was essential for the deputy county court judge to decide whether the arbitrator did or did not exclude the evidence that was tendered before him as to the condition of the premises in 1906. There was strong evidence that the arbitrator did exclude it; and there was also evidence the other way. If the arbitrator did exclude the evidence it would follow that he had declined to decide the very issue that was before him. The deputy county court judge came to the conclusion that it was unnecessary for him to decide whether the arbitrator had or had not rejected this evidence, and I think it is manifest that his reason for coming to that conclusion was that he considered that even if the arbitrator had rejected it that would not be misconduct so as to entitle the deputy county court judge to set aside the award. With great respect to him I cannot agree with that view. Misconduct is not necessarily personal misconduct. If an arbitrator for some reason which he thinks good declines to adjudicate upon the real issue before him, or rejects evidence which, if he had rightly appreciated it, would have been seen by him to be vital, that is, within the meaning of the expression, "misconduct" in the hearing of the matter which he has to decide, and misconduct which entitles the person against whom the award is made to have it set aside. I think the deputy county court judge misconceived the meaning of the word "misconduct" in this connection, and in misconceiving it he gave an erroneous decision in point of law, and inasmuch as there is a right of appeal we must order a new trial so that the question of fact may be decided.

---

(1) [1895] P. 40.

ATKIN J. I agree. As regards the first point it seems to me that the application made by the tenant to set aside the award brings the case within s. 120 of the County Courts Act, 1888. The application was a "matter" in the county court; the general words of s. 120 are wide enough to cover it; and there is nothing in the Agricultural Holdings Act, 1908, to shew that its special provisions are inconsistent with the general provisions as to appeals from county courts. Sect. 43 of the Act of 1908 contains nothing which in my opinion is inconsistent with the right of appeal; it merely deprives the parties of the right of certiorari or any other proceeding by which the judgment is removed into

1914

WILLIAMS
v.
WALLIS
AND COX.

Atkin J.

the High Court. To appeal from a judgment is not to remove it into the High Court; it remains in the county court subject to correction by the High Court on questions of law.

With regard to the main question it appears to me that the deputy county court judge formed a misconception as to the meaning of "misconduct." That expression does not necessarily involve personal turpitude on the part of the arbitrator, and any such suggestion has been expressly disclaimed in this case. The term does not really amount to much more than such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice, and one instance that may be given is where the arbitrator refuses to hear evidence upon a material issue. In this case the material issue on the landlord's claim for breach of the tenant's repairing covenant was what was the condition of the premises in 1906, because the tenant's obligation was to keep them in as good and tenantable condition as they were in 1906. The tenant's contention is that the arbitrator refused to hear any evidence upon that material issue. If in fact he did reject that evidence, that would in my opinion be evidence of misconduct upon which the county court judge would be entitled to set aside the award. Whether the arbitrator did or did not reject that evidence we do not decide; it is a question of fact for the county court judge, and as he did not decide it the case must go back to have it determined.

Appeal allowed. Case remitted.

Solicitors for appellant: *Taylor, Rowley, Lewis & Davis, for David Allen & Carver, Hereford.*

Solicitors for respondents: *Meredith, Mills & Clark, for E. L. Wallis, Hereford.*

J. S. H.

1914
Feb. 25.

PAINE *v.* COUNTESS OF WARWICK.

TYNDALE-WHITE AND ANOTHER, CLAIMANTS.

Will—Tenant for Life and Remainderman—Deer in a Park—Consumable Things—Validity of Gift over.

Deer in a park do not belong to the class of things quæ usu consumuntur, and a gift of them by will for life does not confer on the legatee the absolute interest in them. In such a case the tenant for life is prima facie bound to keep up the herd, and deer purchased for that purpose and added to the herd become subject to the provisions of the will.

Maynard v. *Gibson* [1876] W. N. 204 followed.

TRIAL of an interpleader issue before Pickford J. without a jury.

A judgment having been recovered by a Mr. A. J. Paine against the Countess of Warwick, the sheriff of Essex in execution of the judgment seized amongst other things a herd of deer in the park of Easton Lodge, of which she was tenant for life under the will of Lord Maynard, who died in 1865. By that will Lord Maynard bequeathed to trustees all his plate, household goods, furniture and effects, wines, live and dead stock, including deer, and all musical and other instruments and all other articles and things which at the time of his death should be in or about or belonging to his mansion house called Easton Lodge, upon trust to permit the said articles and things to be held and enjoyed by the person or persons who for the time being should by virtue of the said will be entitled to the possession of Easton Lodge. At the date of the will the herd consisted of 600 head, some of them being red deer, but mostly fallow. At the time of the seizure there were about 400 red deer and 30 fallow. About eight or ten stags were killed every year, only the old ones. In recent years the fallow deer had been killed more freely because they deteriorated. The deer were all tame. From time to time purchases had been made by the tenant for life of fresh deer which had been added to the herd. In 1889 six fallow does were bought; in 1893 two fallow bucks; in 1895 two red

1914

PAINE
v.
WARWICK
(COUNTESS).

stags and two hinds; and in 1902 four stags. All the deer existing at the date of the will and also all those purchased as above mentioned were now dead. Whether any of the deer seized by the sheriff were the progeny of those purchased by the tenant for life was admitted to be a matter incapable of proof. The trustees of the will claimed to be entitled to the deer as against the execution creditor.

Hon. M. Macnaghten, for the trustees of the will. The trustees are entitled to the whole of the herd now existing. Deer are not things quæ usu consumuntur, and therefore Lady Warwick only took a life interest in the herd. In *Groves* v. *Wright* (1) a farmer bequeathed his farming stock and implements of husbandry to trustees on trust to allow his wife to have the full benefit and enjoyment of them for her life and then to sell them and divide the proceeds among his children. It was held that farming stock and implements of husbandry are not consumable things, and that the widow consequently took only a life interest in them. "By such a bequest the testator must . . . . have intended that the widow should have the use of the stock, contemplating that she would carry on the business of the farm with it." So here the testator, who gave the deer for the purpose of being enjoyed in connection with his mansion house, must have intended that the life tenant of the mansion house should only have a life interest in the herd. The trustees therefore are clearly entitled to such of the deer as are the descendants of the herd existing at the date of Lord Maynard's death. They are also clearly entitled to the progeny of such of the bucks and stags as were purchased by Lady Warwick, for, where the male and female of animals belong to different owners, their progeny belongs to the owner of the female. But the trustees are also entitled to the progeny of the hinds and does purchased by Lady Warwick, for she was under an obligation to keep up the herd, and the purchases were made in discharge of that obligation. In *Cockayne* v. *Harrison* (2), where a farmer left his farms and farming stock to his wife for life, Lord Romilly M.R. said: "Here is a gift for life of farming stock which is made in connection with a gift for life of the business, the stock being necessary to carry on the business; and I think that under these circumstances the legatee is bound to keep up the stock." But even if Lady Warwick was not bound to keep up the herd so that the progeny of hinds and does bought by her did not become subject to the trusts of the will, the trustees have a title to such progeny by confusion by reason of her having mixed the deer so bought by her with those belonging to the trustees: Black. Com., bk. ii., ch. 26, s. 7. If a person voluntarily mix his own money with the money of another that other shall have the whole: *Ward* v. *Ayre*. (1) "If a man puts corn into my bag in which there is before some corn the whole is mine; because it is impossible to distinguish what was mine from what was his": per Lord Ellenborough, *Colwill* v. *Reeves*. (2)

---

(1) (1856) 2 K. & J. 347.

(2) (1872) L. R. 13 Eq. 432.

Giveen, for the execution creditor. Deer are consumable things, for they are killed for food; and the general rule with regard to consumable things is that a gift of them over after a gift of a life interest is bad. The only exception to that rule is where the subject-matter of the gift is intended to be used in connection with a trade, such as a farmer's live stock: *Groves* v. *Wright* (3); *Cockayne* v. *Harrison* (4); or the wine in a wine merchant's cellars: *Phillips* v. *Beal*. (5) This last case well illustrates the principle. There a wine merchant by his will left everything of which he might die possessed to his wife for life and after her death to his daughter. He died possessed of a large stock of wine, some in the cellar in his house and some in his trade cellars. It was held that the wife took absolutely the wine in the private cellar but a life interest only in the rest. In *Cockayne* v. *Harrison* (4) Lord Romilly said: "Where there is no trade I am disposed . . . . to hold that the legatee takes an absolute interest." If that is so the present case does not fall within the exception, for the deer here were not used in connection with any trade. It must be conceded, however, that there is an authority directly against this contention. In *Maynard* v. *Gibson* (6), in a suit in which the

(1) (1615) Cro. Jac. 366.

(2) (1811) 2 Camp. 575.

(3) 2 K. & J. 347.

(4) L. R. 13 Eq. 432.

(5) (1862) 32 Beav. 25.

(6) [1876] W. N. 204.

title to this very same herd came in question, Bacon V.-C. held "that deer in the park and pigeons in a dovecote did not belong to the tenant for life absolutely but that he was entitled to their reasonable use and enjoyment as in the case of farming stock and implements of husbandry: *Groves* v. *Wright*." (1) But the fact that that decision is not reported anywhere except in the *Weekly Notes* arouses suspicion as to its correctness. It is contended that it is wrong. There is nothing to shew that Bacon V.-C. had the distinction present to his mind between things to be used in connection with a trade and things of which the use is to be unconnected with a trade. But even if this view is wrong the trustees cannot support their claim, for the onus is on them to shew that the existing deer are the descendants of those existing at the date of Lord Maynard's death, and that it is admitted they cannot do. As to the claim of title by confusion, that only arises where the mixture was wrongfully made, and there was here nothing wrongful on Lady Warwick's part in mixing the purchased deer with the rest of the herd. In such case the respective owners either become owners in common of the mixed property as suggested by Blackburn J. in *Buckley* v. *Gross* (2), or are entitled to it in the proportion in which they contributed to it as held in *Spence* v. *Union Marine Insurance Co.* (3)

Macnaghten in reply.

PICKFORD J. In this case which arises before me on interpleader I have to decide whether a herd of deer in the park of Easton Lodge is the property of the execution creditor or the property of the claimants. The claimants are the trustees of the will of Lord Maynard, the grandfather of Lady Warwick, the execution debtor. By his will Lord Maynard, who died in 1865, left all his household effects, live and dead stock, including deer, and all other articles and things which at the time of his death should be in or about or belonging to his mansion house called Easton Lodge upon trust to permit them to be held and enjoyed by the person who for the time being should by virtue of the said will be entitled to the possession of Easton Lodge. The person now so entitled as tenant for life is Lady Warwick. The question is whether the herd of deer at present in the park is subject to the trusts of that will. It was contended in the first place that tame deer belong to the class of things quæ usu consumuntur, and that therefore the tenant for life is absolutely entitled to them and the gift over is bad; and secondly that, owing to the fact that additions to the herd had been made by the tenant for life, it was impossible for the trustees to shew which if any of the present deer were the descendants of the deer existing at the date of the testator's death. If the first question is to be decided in favour of the execution creditor there is an end of the case, but if otherwise the effect of the purchases of fresh deer by Lady Warwick has to be considered. Upon the first question a number of authorities were cited, some of which are a little difficult to reconcile with others, but I do not feel called upon to express any opinion upon them, because upon this point the case seems to be covered by authority, Bacon V.-C. having in 1876 in a case of *Maynard* v. *Gibson* (1) decided under this very will that Lady Warwick as tenant for life did not take the deer absolutely but was only entitled to the reasonable use and enjoyment of them. That decision does not seem ever to have been disapproved. It is not indeed referred to in Theobald on Wills, and is perhaps opposed to the statement in that book (p. 647 of the 7th edition) that "things quæ ipso usu consumuntur cannot be given over unless they form part of a stock in trade." It is, however, cited in Jarman on Wills (6th ed. p. 1455) without any disapprobation. On the second question I think the case of *Maynard* v. *Gibson* (1) also covers the present case, for Bacon V.-C. held that the herd of deer stood on the same footing as the farming stock and implements of husbandry in the case of *Groves* v. *Wright* (2), with reference to which Page Wood V.-C. said: "If in the course of such business it was necessary that any part of the farming stock should be sold then the substituted stock would follow the course of the original subject of the bequest"—in other words, that the life tenant was bound to keep up the stock. If that principle is, as Bacon V.-C. seems to have held, to be applied to a herd of deer, Lady Warwick was bound to keep up the herd, and the fresh deer which she purchased and added to the herd

---

(1) 2 K. & J. 347.

(2) (1863) 3 B. & S. 566, at p. 575.

(3) (1868) L. R. 3 C. P. 427.

---

(1) [1876] W. N. 204.

(2) 2 K. & J. 347.

1914

PAINE
v.
WARWICK
(COUNTESS).

became subject to the trusts of the will. There must therefore be judgment for the claimants.

Judgment for claimants.

Solicitors for claimants: *G. B. Lawrence & Co.*

Solicitors for execution creditor: *Langford & Redfern.*

J. F. C.

SCHUCK *v.* BANKS.

1914
March 5.

Shop—Weekly Half-holiday—Different Days for different Trades—Article Sold in more than one Trade—Shops Act, 1912 (2 *Geo.* 5, *c.* 3), *s.* 4.

Where a commodity is sold by retail in the ordinary course of the business of more than one class of traders, and the weekly half-holiday under the Shops Act, 1912, is fixed by the local authority for the different classes respectively on different days of the week, a trader who sells the commodity in the ordinary course of his own business is not required to close his shop for the serving of customers with it on the half-holiday fixed for any of the other classes of traders.

Case stated by the stipendiary magistrate for East Ham.

The appellant Frederick Schuck was summoned for having on Thursday, July 3, 1913, in contravention of s. 4 of the Shops Act, 1912 (1), and the East Ham Grocers, Provision Dealers, and General Shopkeepers Half Holiday Closing Order, 1912, kept open his shop for the serving of customers with dripping at 8.30 p.m.

At the hearing the following facts were proved or admitted:—

The appellant had a shop and carried on business there as a butcher and pork butcher at 363, Green Street, in the borough of East Ham, and sold therein all kinds of butchers' meat, fresh and salt, also pork, cooked meats, sausages, and dripping, such dripping being produced in the course of cooking the meats cooked by him for sale in the shop. He did not carry on at his shop any other business than as above described.

---

(1) By s. 4, sub-s. 1, of the Shops Act, 1912, "Every shop shall . . . . be closed for the serving of customers not later than one o'clock in the afternoon on one weekday in every week."

Sub-s. 2: "The local authority may by order fix the day on which a shop is to be so closed (in this Act referred to as the 'weekly half-holiday') and any such order may . . . . fix (*a*) different days for different classes of shops."

The respondent was an inspector appointed by the local authority of the borough for the purposes of the Shops Acts, 1912 and 1913. In the said borough there were in force among others two orders made by the local authority pursuant to the Shops Act, 1912. The one dated October 15, 1912, applied to all shops in the borough "in which the retail trade or business of a grocer, provision dealer, or general shopkeeper is carried on," and provided that all such shops should be closed for the weekly half-holiday at 1 P.M. on Thursday throughout the year. The other order, dated October 15, and confirmed by order of the Home Secretary, applied to all shops in the borough "in which the retail trade or business of a butcher is carried on," and provided that the weekly half-holiday at all such shops should begin at 1 P.M. on Monday in each week, and by the said order the provisions of s. 4 of the Shops Act, 1912, were extended to the sale by retail of meat.

It was common ground between the parties that the appellant was a butcher within the meaning of the East Ham Butchers Closing Order above mentioned. The question was whether by reason of the sale of dripping by him he was not also within the above mentioned East Ham Grocers, Provision Dealers, and General Shopkeepers Half Holiday Order so far as the sale of dripping was concerned.

On Thursday, July 3, 1913, at 8.30 P.M., one Ethel Horn, acting on instructions from the respondent, entered the appellant's shop and purchased a quarter of a pound of dripping.

The preparation and sale of dripping is a normal incident of the trade of a person who cooks and sells cooked meats. The appellant himself had prepared the said dripping from meat used and sold by him in the course of his business. Dripping is sold by grocers and provision dealers as well as by butchers, but it is not manufactured by grocers or provision dealers. The magistrate convicted the appellant.

Barrington-Ward, for the appellant. The object of the Act was to insure that the shop assistants in every shop should have one half-holiday in the week. It was not intended to apply to overlapping trades so as to give the shop assistants as many half-holidays as there were trades in which any of the articles served by them to customers were sold. If it were so the large emporiums which deal in all classes of goods might have to close every afternoon in the week. The magistrate thought that quoad the sale of dripping the appellant was a grocer. But a man whose ordinary business is that of a butcher does not also carry on the retail business of a grocer because in the course of his business as a butcher he sells something which is also sold by grocers.

J. B. Matthews, K.C., for the respondent.

CHANNELL J. We think that it is sufficiently found in this case that this ambiguous article, dripping, is sold by pork butchers as part of a pork butcher's trade. The appellant is a pork butcher and sells dripping as part of his regular business. The pork butchers' closing day is Monday. But dripping is also sold by grocers, and their closing day is Thursday. The appellant on one particular Thursday sold dripping. Did he thereby carry on the business of a grocer or provision dealer? We think he did not. In so holding we must be understood as confining our judgment to articles which are sold in the ordinary course of more than one business. Our view is that the selling by a man of such an article in the ordinary course of his own business is no evidence of his carrying on another business although the article is also customarily sold in that business. Our judgment does not apply to articles which are not of an ambiguous character, and still less to articles which the man has never been in the habit of selling in the course of his own business, but has only started to sell in order that he may have a chance of getting a market for it on days when the other people's business is closed. Upon the facts as we understand them we think that the conviction was wrong and ought to be quashed.

SCRUTTON and BAILHACHE JJ. concurred.

Appeal allowed.

Solicitors for appellant: *W. T. Ricketts & Son.*
Solicitors for respondent: *Wilson & Son.*

J. F. C.

1914
March 5.

TYDEMAN *v.* THROWER.

Child—Prosecution of—Offence not punishable in Case of Adult with Penal Servitude—Power to send to Industrial School—Children Act, 1908 (8 *Edw.* 7, *c.* 67), *s.* 58, *sub-s.* 3.

Under s. 58, sub-s. 3, of the Children Act, 1908, justices have jurisdiction to order a child to be sent to a certified industrial school, as well where he has been guilty of an offence the maximum punishment of which would in the case of an adult be less than penal servitude, as where he has been guilty of an offence which in the case of an adult would be punishable with penal servitude.

CASE stated by justices of Ipswich.

An information was preferred against the respondent Geoffrey Thrower, a boy between the ages of twelve and thirteen, charging him with having indecently assaulted one Katherine Wheeler, a girl aged four. He had not been previously convicted. The justices were satisfied that he had committed the offence charged. They were also of opinion that his character and antecedents were such that if sent to a certified industrial school he would not exercise an evil influence over the other children in the school, but they determined that inasmuch as the offence with which he was charged was not punishable in the case of an adult by penal servitude, but only by some form of punishment less than penal servitude, they had no power under the provisions of s. 58, sub-s. 3, of the Children Act, 1908, or otherwise to order him to be sent to a certified industrial school, and therefore declined to make the order. The prosecutor appealed.

Barrington-Ward, for the appellant. The Children Act, 1908, by s. 57, sub-s. 1, provides that "Where a youthful offender, who in the opinion of the Court before which he is charged is twelve years of age or upwards but less than sixteen years of age, is convicted, whether on indictment or by a petty sessional court, of an offence punishable in the case of an adult with penal servitude or imprisonment, the Court may, in addition to or in lieu of sentencing him according to law to any other punishment, order that he be sent to a certified reformatory school." And by s. 58, sub-s. 3, "Where a child apparently of the age of twelve or thirteen years, who has not been previously convicted, is charged before a petty sessional court with an offence punishable in the case of an adult by penal servitude or a less punishment, and the Court is satisfied that the child should be sent to a certified school, but, having regard to the special circumstances of the case, should not be sent to a certified reformatory school, and is also satisfied that the character and antecedents of the child are such that he will not exercise an evil influence over the other children in a certified industrial school, the Court may order the child to be sent to a certified industrial school." The particular offence with which the boy in this case was charged is dealt with by s. 52 of 24 & 25 Vict. c. 100, and is thereby made punishable in the case of an adult with imprisonment only and not with penal servitude. The question is whether a child charged with such an offence falls within s. 58, sub-s. 3. The justices understood the words "an offence punishable . . . . by penal servitude or a less punishment" to mean punishable by penal servitude as a maximum with an alternative of a less punishment. It is contended that that construction is wrong and that the intention of the Legislature was to give the Court power to send the child to an industrial school where he is charged either with an offence punishable by penal servitude or with an offence punishable by a less punishment. Under s. 15 of the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118), the justices were empowered to send to an industrial school a child of twelve who was charged "with an offence punishable by imprisonment or a less punishment." That Act is now repealed by the Children Act, 1908, which enlarges the power of the earlier Act by allowing a child to be sent to an industrial school even where he has committed an offence punishable by penal servitude. It can hardly have been intended at the same time to take away the power which already existed of sending a child to an industrial school where he was charged with an offence punishable only by imprisonment. If it is to be held that a child must now commit an offence punishable by penal servitude before he can be sent to an industrial school the effect will be materially to diminish the utility of those schools. No doubt the construction contended for will empower justices to send a boy to an industrial school who has committed a trifling offence punishable only by a fine, such as riding a bicycle on a footpath—for such a punishment is less than penal servitude. But that affords no argument against the correctness of the construction.

No counsel appeared for the respondent.

CHANNELL J. The justices have asked us what is strictly speaking a theoretical question, our answer to which will have no effect upon their decision in the present case, for the boy has, we understand, been discharged. They have asked whether their decision was correct with a view to their guidance in the event of a similar case arising in the future. As a rule the Court will not entertain such a question. But here it was not purely speculative, it did in fact arise, and we think that under the circumstances it is right that we should state our view of the law. The question is whether there is power to send a boy to a certified industrial school where he has committed an offence which is punishable only by imprisonment and not by penal servitude. That depends upon the construction which ought to be put on the language of s. 58, sub-s. 3, of the Children Act, 1908; which section must be compared with and read together with s. 57. By s. 57, sub-s. 1, where a boy between the ages of twelve and sixteen is convicted of "an offence punishable with penal servitude or imprisonment" the Court may send him to a certified reformatory school; and by s. 58, sub-s. 3, where a boy between the ages of twelve and fourteen is charged with "an offence punishable by penal servitude or a less punishment" the Court may send him to a certified industrial school. The question is what is meant by "punishable by penal servitude or a less punishment"? Does it mean an offence which is punishable with penal servitude or in the discretion of the Court with the alternative punishment of imprisonment or fine? Or does it mean that the power may be exercised either where the charge is of an offence punishable with penal servitude or where it is of an offence punishable with a less punishment? We think the latter is the correct interpretation. Sect. 57 must be construed in the same way as s. 58, and the result of doing so would be that if the view of the justices were right there would be no power to send a boy

1914

TYDEMAN *v.* THROWER.

Channell J.

to a reformatory school unless he had committed an offence punishable with penal servitude. We think that that can hardly have been intended. The effect of our interpretation will no doubt be that the justices will have power to apply the provisions of s. 58, sub-s. 3, even in the case of slight offences punishable only with a fine. But though they may send a boy to an industrial school for such an offence they will not be able to send him to a reformatory school, for s. 57, sub-s. 1, requires that the offences there dealt with shall be punishable with imprisonment as the minimum.

SCRUTTON and BAILHACHE JJ. concurred.

Appeal allowed.

Solicitors for appellant: *Church, Rackham & Co.*

J. F. C.

[IN THE COURT OF APPEAL.]

C A.

1913

Nov. 6, 7; *Dec.* 19.

RICHARDS *v.* WREXHAM AND ACTON COLLIERIES, LIMITED.

DAVIES *v.* SAME.

Mine—Coal Mine—Colliers working in a Sett—Fillers working with Colliers—Fillers' Wages paid by Colliers—Liability of Colliery Owners to Fillers for Wages—Coal Mines (Minimum Wage) Act, 1912 (2 *Geo.* 5, *c.* 2).

The plaintiff was a filler employed at the defendants' colliery. In that colliery the coal was worked by colliers in setts. Each sett consisted of two or more colliers, and to each sett one or more fillers were attached. The fillers' duty was to load the tubs with the coal when gotten by the colliers, and the tubs were then sent to the surface, where the weight of the coal sent up was credited to the sett. The colliers were paid by the defendants at the end of each week according to the weight of the coal credited to the sett, one of the colliers, called the contractor, receiving payment of the amount due to the sett. A filler was paid a daily wage, which had been for some years before the passing of the Coal Mines (Minimum Wage) Act, 1912, 5*s.* 11*d.* less 2*d.* for subscriptions, and he was paid his remuneration each week by the contractor of the sett out of the money received by him from the defendants. The filler was engaged by the colliery manager; he as well as the colliers signed a document headed "Terms of Employment," under which he agreed to be bound by the regulations of the colliery; he was sent by an official of the colliery to work with a sett, and if the sett were dissatisfied with him it asked the management to remove him; and his dismissal rested with the management. There was evidence that, apart from an arrangement made in 1908 between colliery owners and colliers as to "hard or difficult places," no allowance was made by the defendants when paying the contractor of the sett in respect of the fillers' wages, that the fillers looked to the contractor for payment, and that if the amount paid by the defendants to the contractor was not sufficient to pay all, the contractor was still bound to pay the filler his full wages. After the passing of the Coal Mines (Minimum Wage) Act, 1912, the minimum rate of wages for a filler was fixed at 4*s.* 10*d.* a day. For the week ending June 19, 1912, the contractor paid the plaintiff at the rate of 4*s.* 10*d.* a day, and the plaintiff brought an action in the county court against the defendants to recover the balance of the wages, namely, the difference between 4*s.* 10*d.* and 5*s.* 11*d.* a day. The county court judge found that there was a custom to pay a filler 5*s.* 9*d.* per day clear, that the collier had always paid it out of his tonnage wages (except in case of payment under the hard and difficult place agreement), but that there was no privity of contract between the defendants and the filler. He accordingly gave judgment for the defendants. The Divisional Court held that the evidence was conclusive that the defendants were the employers of the plaintiff and bound to pay him his wages, and they gave judgment for the plaintiff:—

Held by the whole Court, that there was evidence upon which the county court judge was entitled to find that apart from the Coal Mines (Minimum Wage) Act, 1912, there was no privity of contract under which the plaintiff could claim wages from the defendants.

With regard to the Coal Mines (Minimum Wage) Act, 1912:—

Held by Vaughan Williams L.J., that the effect of the Act was to render the defendants as colliery owners liable to pay the plaintiff his wages.

Held by Buckley and Kennedy L.JJ., that the Act did not make any alteration in the person liable to pay the wages, and did not create a contract to pay wages where none existed independently of the Act, and that the defendants were not liable to the plaintiff.

APPEAL from the judgment of a Divisional Court (Ridley and Lush JJ.) reversing the judgment of the county court of Denbighshire holden at Wrexham.

The facts in the two actions were similar, and it was agreed that the decision in the first case should govern both cases. It is only necessary, therefore, to state the facts in the first action.

The claim was to recover 4*s.* 4*d.*, being the balance of wages

C. A.
1913

RICHARDS
v.
WREXHAM
AND ACTON
COLLIERIES,
LIMITED.
DAVIES
v.
SAME.

alleged to be due to the plaintiff for the week ending June 19, 1912. The plaintiff was employed as a filler at the defendants' colliery, which was situated in the North Wales district created by the Coal Mines (Minimum Wage) Act, 1912. In the defendants' colliery the system of working the coal—and this system was general throughout the North Wales district—was as follows: Two or more workmen, known indifferently as colliers, contractors, or chartermasters, worked together at getting the coal in a "sett," and the defendants assigned them a place in the colliery where they worked. The colliers were engaged by the defendants, and they signed a document headed "The Wrexham and Acton Collieries Company Limited. Terms of Employment," commonly called "signing on" (1), and there were certain printed "Conditions of Employment" for persons employed at the colliery. (2) The colliers were paid for the coal gotten by

(1) The document was as follows: "Any person employed in or about the works, and whether employed directly by the company or by chartermaster, or other person, must give 14 days' written notice of his intention to leave, before leaving his employment; such notice to be left on the pay-night at the office of the company. Fourteen days' written notice will be given to any person employed in or about the works previously to his being discharged; unless he shall have misconducted himself, or sent up in his tub or wagon slack, brasses, or shale mixed with the coal, in which case he may be instantly dismissed, or unless he was specially engaged for some specified time, or to do some special work. Also for neglect of work, and swearing in or about the mine.

"The agent or manager will, in every case, where a labourer, workman, or other person shall be put to work for a specified time, or to do special work, inform such labourer, workman, or person that he will only be required for such time, or to do such work, as the case may be, and in this case notice will neither be given nor required.

"All other usual and customary terms and regulations, which from time to time obtain or exist with respect to the employment of workmen employed at the above colliery and works, whether expressed in writing or not, shall so far as they are not inconsistent with these conditions be and remain in full force and effect as part of the contract between the employers and the workman."

(2) This document was headed "Conditions of Employment at the Wrexham and Acton Collieries for all persons employed at the collieries and works directly or indirectly." It contained eight conditions, some of which required "the persons employed at the colliery directly or indirectly" to be members of the North Wales Miners' Permanent Relief Society. Condition 7, headed "For Miners and Contractors only," was as follows: "Every miner and

them at a tonnage rate according to the price list with an addition of a varying percentage, which in the present case amounted to 50 per cent. To each sett one or more fillers were assigned by a colliery official. Each sett was distinguished by a number. The filler's duty was to load the coal when hewn by the colliers into tubs, and a tally with the number of the sett was placed on each tub when filled, and the tub was then sent to the surface, where the amount of coal sent up was entered on a pay sheet, and the sum in respect thereof credited to the sett. At the end of each week the total amount appearing on the pay sheet, with the addition of the ruling percentage, was paid to each sett, the practice being for one of the colliers in the sett, specially called the "contractor," to receive payment for the sett. The contractor then paid the filler or fillers in the sett the wages due to him or them. According to the evidence the filler was engaged by the manager or some other official of the colliery company, and he signed the document headed "Terms of Employment." A colliery official, usually the fireman, sent him to work with a sett; the colliers in the sett did not choose the filler, but if they were not satisfied with a filler they complained to the management of the colliery, who would remove him and supply another filler in his place; and his dismissal rested with the

---

contractor employed at the colliery shall upon engaging any filler, drawer, workman, or other person to work under him, and before employing such filler, drawer, workman, or other person, require such filler, drawer, workman, or other person to obtain a copy of these conditions from the officer whose duty it is to provide such copies, and inform such filler, drawer, workman, or other person that they are the conditions under which persons are employed at the colliery, and such miner, filler, drawer, workman, and other person respectively shall be bound by such conditions." Condition 8, headed "For fillers, drawers, and persons working under contractors only," was as follows: "Every filler or drawer employed by any miner, and every workman or other person employed by a contractor at the colliery, shall at the request of such miner or contractor obtain a copy of these conditions from the officer whose duty it is to provide such copies, and such filler, drawer, workman, or other person shall, in consideration of being employed at the works, and of the payments made by the owner under the third condition, be bound both as between himself and the miner or contractor, and between himself and the owner by the terms of these conditions."

management of the colliery. The filler made no bargain as to his wages, but according to the evidence he was paid a daily wage which for several years had amounted to 5*s.* 11*d.*, less 2*d.* deducted for club subscription and oil, leaving 5*s.* 9*d.* net; and this wage was paid each week to the filler by the "contractor" of the sett out of the amount received from the colliery company for the coal gotten by the sett. There was evidence that the "contractor" would have to pay the filler his wages even though the amount received by him from the colliery company in respect of the coal gotten by the sett was insufficient for that purpose, and that the filler looked to the contractor to pay him. (1) Owing to a grievance of the colliers that in "hard or difficult places" they could not earn sufficient money for themselves after paying the fillers unless the colliery company supplemented the amount due to them, an agreement was made and embodied in the price list (known as the "hard and difficult place agreement") which came into operation on January 1, 1908, that in such a case the minimum rate of wages for a collier was to be 4*s.* per day in addition to the ruling percentage, and (clause 14 of the price list) that "fillers working in hard or difficult places, or when taken out of their places to work for the company, to be paid at current rates, as per the basis of 1888." In the present case it was agreed that it should be assumed that the place where the plaintiff and the colliers were working during the week ending June 19, 1912, was not a "hard or difficult place."

After the passing of the Coal Mines (Minimum Wage) Act, 1912, minimum rates of wages and district rules were made on May 23, 1912, under the Act for the North Wales district by the chairman of the joint district board. The minimum rate of wages for a collier was fixed at 6*s.* per day and for a filler (called therein a "loader") 4*s.* 10*d.* per day, these rates to be net rates, that is to say, free from all deductions in respect of tools, lamps, and explosives. By rule 1 of the district rules, "In ascertaining the earnings of colliers for the purposes of the minimum wage, there shall not be deducted from their gross

---

(1) The material extracts from the evidence are set out in the judgment of Kennedy L.J.

C. A.
1913

Richards v. Wrexham and Acton Collieries, Limited.
Davies v. Same.

earnings more than the minimum rates fixed by this board for the class of filler or other workmen employed by them."

The plaintiff had been employed for about seven years as a filler in the defendants' colliery. He had worked with different setts, and he never made any bargain as to his wages. He had always been paid up to the week ending June 19, 1912, wages at the rate of 5*s.* 9*d.* per day clear by the "contractor" of the sett. For about twelve months before the week in question he had worked as filler with sett No. 32, which was composed of four colliers and himself, of whom one, John Jones, was the "contractor" who received each week the money due to the sett, and who paid the plaintiff his wages. For the week ending June 19, 1912, the contractor paid him the sum of 4*s.* 10*d.* per day, being the amount of the minimum wage settled as above mentioned, for four days' work, amounting in all to 19*s.* 4*d.*, and the plaintiff brought this action in the Wrexham County Court against the defendants, the colliery owners, to recover 4*s.* 4*d.*, being the balance of the wages alleged to be due to him for four days' work, namely, the difference between 5*s.* 11*d.* per day and 4*s.* 10*d.* per day. It was contended on behalf of the plaintiff that the defendants were his employers and that he was entitled to sue them for his wages.

The county court judge in giving judgment said: "I find custom exists to pay filler 5*s.* 9*d.* clear per day, but that collier has always paid it out of his tonnage wages, except in case of payments under hard and difficult place agreement. I find no privity of contract between filler and colliery company." He accordingly gave judgment for the defendants, with leave to appeal.

The Divisional Court held that upon the evidence the only conclusion possible was that the defendants were the employers of the plaintiff and bound to pay him his wages, and that the collier was not the employer, and they set aside the judgment of the county court judge, and entered judgment for the plaintiff for the amount claimed.

The defendants by leave appealed.

Leslie Scott, K.C., and *Lloyd-Greame*, for the defendants. The county court judge having found upon the evidence that there was no privity of contract between the fillers and the colliery company, the question is whether the Divisional Court were justified in reversing that finding as being one which there was no evidence to support. It is a question of fact, and the onus of proving a contract of employment by the defendants lies on the plaintiff. If there is evidence to support the finding of the county court judge the Divisional Court had no power to set aside his finding. There is no written contract for the employment of fillers, but the evidence shewed that it was customary to pay the filler a wage of 5*s.* 9*d.* clear per day; and that, though the fillers were engaged and were liable to be dismissed by the colliery owners, they were paid by the colliers, or by the head collier specially called the "contractor," of the sett in which they worked. The evidence was to the effect that, even though the colliers did not earn sufficient in any week to pay the fillers and themselves, the colliers would still have to pay the fillers their full wages. This is apart from the agreement of 1908 as to "hard or difficult places," which is not material here. No doubt the fillers have to sign the "Terms of Employment" when being engaged by the colliery owners, but that is done for the sole purpose of retaining in the hands of the colliery owners full control over all persons working in the mine so as to secure the safety of the workmen, which is required under the Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50). The "Terms of Employment" recognize that there may be persons working in the mine who are not employed by the colliery owners because they speak of "any person whether employed directly by the company, or by the chartermaster, or other person." The "Conditions of Employment" also recognize the fact that fillers are employed by the miners. The fact of the fillers signing the "Terms of Employment" and being bound by the conditions of employment in operation at the colliery does not create a contract of employment between them and the colliery owners: *Fitzpatrick* v. *Evans & Co.* (1) Rule 1 of the district rules for the North Wales district, made under the Coal Mines (Minimum Wage) Act, 1912, also recognizes that fillers are employed not by the colliery owners but by the colliers. There may be

---

(1) [1901] 1 K. B. 756; [1902] 1 K. B. 505.

C. A.
1913

Richards
v.
Wrexham
and Acton
Collieries,
Limited.
Davies
v.
Same.

contractual relations between the fillers and the colliery owners, as, for instance, that the fillers shall obey the regulations in the mine, and be under the control of the colliery officials while working in the mine, but there is no contract by the colliery owners of employment at wages. Clause 14 of the price list of January 1, 1908, also supports this view, because it provides that fillers, "when taken out of their places to work for the company," are to be paid at current rates. That negatives any inference of liability to pay them in other circumstances. There was evidence upon which the county court judge was entitled to find that there was no privity of contract, so far as the payment of wages was concerned, as between the fillers and the defendants, and the Divisional Court could not overrule that finding. [*Johnson* v. *Lindsay & Co.* (1) and *Donovan* v. *Laing, Wharton, and Down Construction Syndicate* (2) were also referred to.]

J. Sankey, K.C., and *G. C. Rees*, for the plaintiff. The plaintiff was employed by the defendants. He was engaged by the defendants, and upon his engagement he signed the "Terms of Employment." He was thus placed under the control of the defendants while working in the colliery, and they could assign him to any sett they pleased, and remove him to another sett; and they alone could dismiss him. The only reasonable inference to draw from those facts is that the defendants were his employers and as such were under an obligation to pay him his wages. The proper inference is that the defendants sent the filler to work with the sett with an implied promise that the sett would be provided by them with the money to pay the filler his wages. The collier who receives the money for the sett is merely the hand by which the defendants pay the wages. If the defendants are not the employers of the filler, it is difficult to see who are his employers. There may be several colliers in a sett, and it cannot be that they are all employers of the fillers working in that sett. All the colliers are in the same position except that one of them is deputed to receive the wages due to the sett. Must the filler sue all the colliers for his wages? If a filler is injured by an accident arising out of and

(1) [1891] A. C. 371.

(2) [1893] 1 Q. B 629.

in the course of his employment, must he claim compensation from the colliers under the Workmen's Compensation Act, 1906? If the filler is wrongfully dismissed by the colliery owners, what would be the measure of damages in an action against the colliery owners? It would lead to absurd results if it were held that the fillers were in the employment of the colliers, and that is a consideration germane to the case when it is a question as to what is the proper inference of fact to draw. The true inference from the facts is that the defendants have agreed to pay the filler his wages; that the collier is merely the agent of the defendants to pay the filler and at the same time the agent of other workmen in the sett to receive payment of their wages for them from the defendants. If the defendants do not pay the collier sufficient money to pay the filler, the filler may sue them. Again, clause 14 of the price list shews that there is privity of contract between the defendants and the fillers in the case of hard or difficult places. That is some evidence of privity of contract in other circumstances.

Next, even if before the Coal Mines (Minimum Wage) Act, 1912, was passed the fillers were in the employment of the colliers and not of the colliery owners, the effect of the Act is to make the colliery owners the employers of all workmen employed underground in the colliery so as to be liable to them for their wages. By s. 5, sub-s. 1, a "workman" is defined as meaning "any person employed in a coal mine below ground," with certain exceptions not material to this case. A filler is therefore a "workman" within the meaning of the Act, and by s. 1, sub-s. 1, "it shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum rate settled under this Act." The word "employer" there necessarily means the colliery owner. The scheme of the Act is that there shall be in every district named in the schedule to the Act a joint district board, which under s. 2, sub-s. 2, shall contain an equal number of representatives of the employers and workmen. The duty of the board is to make district rules and to settle minimum rates of wages for the district. District rules and minimum rates of wages have been settled by a joint district

C. A.
1913

Richards
v.
Wrexham
and Acton
Collieries,
Limited.
Davies
v.
Same.

board representative of the colliery owners as employers and the workmen, including the fillers. The Act would not be workable if there were more "employers" than one in a colliery. The scheme of the Act precludes there being two sets of employers in a coal mine. The Act contemplates one joint district board for each district, and not a number of subsidiary boards composed of employers and workmen other than the colliery owners and the workmen in their employment. If the defendants' contention is correct, a collier would be a workman on one board and an employer on the other. The effect of the Act therefore is to make all workmen employed underground in a mine in the employment of the colliery owners, and it is an implied term in their contract of employment that the colliery owners shall pay them wages at not less than the minimum rate; and by s. 2, sub-s. 1, nothing in the Act is to prejudice the operation of any agreement or custom existing before the passing of the Act for the payment of wages at a rate higher than the minimum rate. The county court judge has found that there is a custom to pay the fillers 5*s.* 9*d.* clear per day, which is a rate higher than the minimum rate, and the defendants are liable to pay the plaintiff that amount. Rule 1 of the district rules made under the Act is therefore ultra vires. The collier being the agent of the colliery company to pay the filler his wages must pay him at the rate of 5*s.* 11*d.* per day including his subscription. Take the case of a collier only earning wages at the rate of 11*s.* a day. The colliery company under the rule might say that the collier was only entitled to deduct 4*s.* 10*d.* for the filler's wages and that, as that left 6*s.* 2*d.* for himself, which exceeded the minimum wage, they owed him nothing. The collier is entitled to the minimum wage of 6*s.* after deducting the filler's wages, and the rule is ultra vires.

Leslie Scott, K.C., in reply. With reference to the Coal Mines (Minimum Wage) Act, 1912, the words "employment of a workman" and "employer" do not refer exclusively to the colliery owners. In order to interpret those expressions it is necessary to remember what was the mischief which the Act was intended to remedy and what were the facts which were known to exist at the time of the passing of the Act. The mischief which the Act was intended to remedy was that men working in coal mines sometimes did not receive a reasonable wage. It was a common and well-known practice in coal mines for persons working in a mine in the employment of the mine owner to be themselves contractors employing men under them. There might therefore be several employers in one mine. The Act in providing that workmen in a coal mine shall receive wages at not less than a minimum rate did not intend to transfer from one person to another the obligation to pay those wages. The Act does not interfere with the contract of employment except to say, by s. 1, sub-s. 1, that it shall be an implied term that the employer shall pay to the workman wages at not less than the minimum rate. The Act nowhere interferes with the nature of the employment. The employer, whoever he is, must pay the workman he employs wages at not less than the minimum rate. The contract of employment referred to in s. 1, sub-s. 1, of the Act is a contract of employment at wages. The Act is dealing with an obligation to pay wages, and it says that that obligation shall be to pay wages at not less than the minimum rate. Sect. 2, sub-s. 1, assumes the existence of a contract to pay wages, and if the contractual rate of wages is higher than the minimum rate the Act does not affect the contract. An intention to transfer the burden of that contract from one person to another cannot be implied; if the Legislature had intended to do so it would have used clear language for that purpose. The Act does not make a contract where there was none before. The word "employer" is used, not colliery owner. *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co.*(1) and *Fitzpatrick* v. *Evans & Co.*(2) are cases which shew that there may be persons working in a mine who are not servants of the mine owner. Such persons may come under contractual relations with the mine owner while working in the mine and may be under the control of the mine owner for the purpose of securing the safety of those working in the mine. This state of matters was recognized in the Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58), ss. 8 (2.), 11 (2.), 12, 22, and 75. Those sections, except s. 12, have now been repealed, and are

---

(1) [1898] 2 Q. B. 588.

(2) [1901] 1 K. B. 756; [1902] 1 K. B. 505.

C. A.
1913

RICHARDS v. WREXHAM AND ACTON COLLIERIES, LIMITED.
DAVIES v. SAME.

re-enacted with amendments in the Coal Mines Act, 1911, ss. 27 (1.), 94 (2.), 96 (3.), and 122.

The fact that there were workmen employed in a coal mine who were not in the employment of the mine owner, but were employed by contractors, was known to the Legislature when the Coal Mines (Minimum Wage) Act, 1912, was passed, and yet there is no provision that the mine owner shall pay them their wages. In *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co.* (1) and *Fitzpatrick* v. *Evans & Co.* (2) the workman was employed by a contractor for sinking a shaft in the mine, and if the plaintiff's contention is correct the mine owner would now be liable to pay him his wages. Any difficulty in working the Act cannot affect its plain meaning: *Lysons* v. *Andrew Knowles & Sons.* (3) There is, however, no difficulty in working the Act. There can, no doubt, only be one joint district board for each district, but s. 4 of the Act may be read as giving power to the Board of Trade in any special case to appoint additional members of the board where the ordinary representatives of the employers and workmen are not sufficient. This is done under s. 11 of the Trade Boards Act, 1909 (9 Edw. 7, c. 22), under which trade boards are established representing masters and men. In many trades there are sub-contractors, and by the regulations made by the Board of Trade under the Act the Board of Trade nominate additional representative members to the board so as to secure proper representation of any classes of employers or workers (see Statutory Rules and Orders, 1910, pp. 825 et seq.).

Cur. adv. vult.

Dec. 19. VAUGHAN WILLIAMS L.J. read the following judgment:— This was an action brought in the county court by the plaintiff as a filler employed at the defendants' colliery, with sett No. 32, the "contractors" being John Jones, Edwin Rogers, Robert Griffiths, and William Powell, against the defendants, the Wrexham and Acton Collieries, Limited, for balance of wages due to him for the week ending June 19, 1912 (i.e., since the passing of the Coal Mines (Minimum Wage) Act, 1912), made up as follows: Four days' wages at 5*s.* 11*d.* per day, 1*l.* 3*s.* 8*d.*, less amount paid on account being four days at 4*s.* 10*d.* a day (being the minimum fixed under the district rules), 19*s.* 4*d.*, leaving a balance of 4*s.* 4*d.*, the amount claimed.

---

(1) [1898] 2 Q. B. 588.

(2) [1901] 1 K. B. 756; [1902] 1 K. B. 505.

(3) [1901] A. C. 79.

There is, I think, no doubt on the evidence but that the plaintiff was employed by the defendants in the sense that he was engaged by the defendants and appointed by them to the sett, with whom he was to work, and that he was liable to be dismissed or to be transferred at any time to another sett by the defendants; but there is also no doubt that the rate of wages (even though there was evidence that at one time it was fixed by the contractor) was fixed by the sett and not by the defendants, yet at the material time had come to be a fixed wage of 5*s.* 9*d.* clear, and that if in any week the colliers failed to earn full wages, the colliers still paid to the fillers the full amount of wages at the rate agreed upon by the colliers and fillers—in other words, the fillers were paid in full, and the colliers bore such loss as there was.

The learned county court judge has found that there is a custom to pay the fillers 5*s.* 9*d.* clear per day, that is, as I understand it, 5*s.* 11*d.* less 2*d.* for certain subscriptions; and I understand that this finding means that there is no longer any specific bargaining between colliers and fillers, but that it is recognized by both colliers and fillers that the amount to be paid to the filler is 5*s.* 9*d.* clear per day whatever may be the earnings of the colliers, and all fillers work on that understanding.

This, I think, is an important point to remember, for s. 2, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, expressly provides that "Nothing in this Act shall prejudice the operation of any agreement entered into or custom existing before the passing of this Act for the payment of wages at a rate higher than the minimum rate settled under this Act."

The learned county court judge, however, next found that the "collier has always paid it" (the filler's wage) "out of his tonnage wages, except in case of payments under hard and difficult place agreement. I find no privity of contract between filler and

C. A.
1913

RICHARDS v. WREXHAM AND ACTON COLLIERIES, LIMITED.
DAVIES v. SAME.

Vaughan Williams L.J.

colliery company," and therefore gave judgment for the defendants, and the question before us is whether that decision, which was reversed by the Divisional Court, is correct; and in order to decide this question it is, I think, necessary to consider the terms of the Minimum Wage Act.

Sect. 1, sub-s. 1, of the Act enacts that "it shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum rate settled under this Act and applicable to that workman, unless it is certified in manner provided by the district rules that the workman" is excluded from the provisions of the Act or has forfeited his right to wages for some reason; "and any agreement for the payment of wages in so far as it is in contravention of this provision shall be void." Sub-s. 2 of s. 1 enacts that the district rules shall lay down conditions, as respects the district to which they apply, with respect to the exclusion from the right to the minimum wage of aged and infirm workmen, and shall lay down conditions as to regularity and efficiency of the work by the workmen, and with respect to the time for which a workman is to be paid in the event of interruption of work by an emergency, and shall provide that the workman shall forfeit his right to the minimum wage if through his own fault he is not regular or efficient in his work. It further enacts that the rules shall provide for a tribunal and means of settling questions which may arise as to the conditions so provided by the rules.

It is, I think, clear that fillers are within the definition of workmen in s. 5 of the Act, and it seems to me that the whole gist of s. 1 of the Act is to regulate for the future the action of the colliery proprietor in respect of the minimum wage payable by him to the workman, including in this case the fillers. The contract, in which for the future "it shall be an implied term of the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum rate settled under this Act," is, to my mind, by statutory implication a contract between the colliery proprietor, who has to pay, and the workman (including here the filler) employed underground in the mine; and I think that the basis of the further provisions of s. 1 is that if a dispute shall arise as to the right, exempli gratia, of the workman to be paid during any interruption of work due to an emergency, the dispute shall be settled as between the colliery proprietor on the one part and the workman on the other, and that this again shews that the whole contract is to be regarded as a contract between the filler and the company.

Now there was evidence before the county court judge, and not a mere scintilla of evidence, that heretofore the fillers have received from or through the hands of the colliers the sum of 5*s.* 11*d.*, less 2*d.* for certain subscriptions, and the question which we have to decide is who, having regard to the provisions of the Minimum Wage Act, is liable now to pay the difference between the 4*s.* 10*d.* and the 5*s.* 11*d.* to the fillers. In practice, as we have seen, up to the date of the Minimum Wage Act, the colliers paid the whole of the wages to the fillers arrived at or agreed upon between the colliers and the fillers without the intervention of the company, so that if the colliers' earnings were not sufficient to enable them to receive the total sum they would ordinarily be entitled to be paid at the piece-work rate, the colliers, nevertheless, in the past paid the fillers' wages as agreed out of the gross earnings of their piece-work. It will be noted that the gross was not a fixed sum, it was the result of piece-work, and was a total which depended upon matters like the diligence and capacity of the collier and the difficulty of working the particular section at which he was engaged. If the company paid a sum to each collier arrived at on the piece-work system, it is impossible that that sum paid by the masters should be affected in amount by the payment to the fillers, if the payment to the fillers was at a rate agreed upon from time to time between the colliers and the fillers without the intervention of the company. It seems to me that one must assume that the piece-work rate in the particular colliery must have been, and must have been intended to be, a liberal average rate which, it was contemplated, would enable the collier to retain for himself a fair remuneration for his labour, and yet have sufficient balance left to enable him to pay such fair fixed sum as the colliers and the fillers might agree upon.

C. A.
1913

RICHARDS v. WREXHAM AND ACTON COLLIERIES, LIMITED.
DAVIES v. SAME.

Vaughan Williams L.J.

So long as this state of things continued, I think that the colliers and the fillers understood between themselves that, although the engagement of the filler was by the company, who could, and could alone, select the man, assign him to a sett, and dismiss him for misconduct, yet the company, although they may have been bound to supply the colliers with a sufficient wage to enable the collier to pay the filler the wage agreed upon, were not to be responsible to the filler for the wage; and there was therefore evidence on which the county court judge could properly find that before the passing of the Act there was not privity of contract between the fillers and the company; but I think that the Minimum Wage Act has altered all this. The Act itself contemplates that the company shall at least be liable to pay the filler the minimum of 4*s.* 10*d.*, and I think that it is a reasonable inference from this that the company should be liable to pay to the filler, not only the minimum wage of 4*s.* 10*d.*, but also the excess of that sum which, since the passing of the Minimum Wage Act, exceeds the 4*s.* 10*d.* It is true, in a sense, that the colliers have never in terms had the fixing of the rate of payment to the fillers discontinued, but the truth is that of late years the rate of payment to the fillers has been a fixed rate, and this the county court judge has found; and I think that if, which the evidence does not seem to make clear, the colliers have paid the difference between the 4*s.* 10*d.* and the 5*s.* 11*d.* out of their own wages, they have done so since the Minimum Wage Act as the agents of the company, and that the fillers have the right to have this money paid to them directly by the company, if they choose to apply to the company instead of to the colliers as the company's agents. I see nothing in the evidence to prevent the colliers, who have paid the fillers' wages, applying to the company for the excess beyond the 4*s.* 10*d.* which is the maximum sum which the colliers are by rule 1 entitled to deduct or to have deducted from the gross sum of wages which they receive. I think the colliers might refuse as agents of the company to pay the filler at all, and in such case no question of deduction would arise. The passing of the Minimum Wage Act and the award of the district board dealing with the maximum deduction only bind the colliers of the sett in case they choose to pay the fillers directly, but I think they can if they choose refuse as agents of the company to pay the fillers at all. But even if they choose to pay them, and doing so are bound as between themselves and the company not to make any deduction from their gross earnings exceeding the 4*s.* 10*d.*, this does not prevent the fillers who are not bound by this rule suing the company for the balance due to them exceeding the 4*s.* 10*d.* I say this, because the effect of the Act is to leave the company responsible for the gross wage due from them to the fillers; the Minimum Wage Act fixes the minimum wage payable by the company to the filler, not the maximum; and if the company through their agents, the colliers, have agreed to pay something in excess of the minimum 4*s.* 10*d.*, I think the company can be sued for such excess by the fillers.

The effect of the Minimum Wage Act is to make the company the masters who are bound to pay the minimum to the fillers, and a larger sum if they have agreed to pay such larger sum through their agents the colliers.

For these reasons, therefore, I think that this appeal must be dismissed.

Buckley L.J. read the following judgment:—I will take first the question arising upon s. 1 of the Coal Mines (Minimum Wage) Act, 1912. For this purpose I have to make the hypothesis that apart from the Act there existed no contract for employment at a wage between the colliery owner and the filler. Under these circumstances, does the statute create one? If the filler is in fact employed at a wage by the chartermaster or collier, and not by the colliery owner, does the word "employer" in s. 1 mean not the chartermaster but the colliery owner? I think not. The purpose of the section is not to create a liability and define its amount, but only to define the amount to which an already existing liability shall extend. The effect of s. 1 is to add to every contract for the employment of a workman underground an implied term that the employer shall pay the workman wages at not less than the minimum rate. In this context the words "contract for the employment of a workman" must, I think, mean contract for the employment of a workman at a wage. The subject of the Act is wages. The Act is going to operate upon those provisions of all contracts of employment which have to do with wages. The contract mentioned in s. 1 must, I think, be a contract for employment at wages. The section, therefore, is only applicable where, as between the persons to whose contract the implied term is to be added, there was a contract for employment at wages. By the hypothesis with which I started, there was no such contract between the colliery owner and the filler. There being no such contract, there is nothing to which the implied term can be added. Under these circumstances the colliery owner is not an employer within, and there is with the colliery company no contract by the filler for employment within, the language of s. 1.

Upon the hypothesis with which I started, there existed a contract for employment at wages between the collier and the filler. Sect. 2 preserves unaltered this contract if it was one for payment of wages at a rate higher than the minimum rate. But the Act has no operation to transfer the obligation of that contract from the collier to the colliery company. Upon this point the decisions in *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co.* (1) and *Fitzpatrick* v. *Evans & Co.* (2) are, in my opinion, in point, not because they were cases in which the question arose as between the colliery worker and the colliery owner, nor because they arose under the Act of Parliament with which I have to deal, but because they were cases in which, under analogous circumstances, it was decided that the servant of the sinker did not, by the operation of the Acts of Parliament there in question, become a servant of the colliery company. In those cases, as in the present case, there did exist certain contractual relations between the colliery owner and the workman under which the latter contracted with the former that he would obey regulations, and in which he was for certain purposes under the colliery owner's control. The Court held there, as I think is the case here, that there was a certain contract between the colliery owner and the workman, but the question remains as to what was the nature of that contract. Here the revelant matter in respect of that contract is that it involved no obligation as between colliery owner

(1) [1898] 2 Q. B. 588. (2) [1901] 1 K. B. 756; [1902] 1 K. B. 505.

and filler to pay wages, and the question is whether the obligation to pay wages was by the statute transferred from the existing contracting party to another party so that by virtue of the statute a party who had not contracted to pay wages was constituted a new contracting party in that respect. In my opinion that question is to be answered in the negative.

In the Coal Mines Regulation Act and the Minimum Wage Act there are not wanting indications that employment not by the colliery owner but by contractors working within the mine and employing servants of their own is contemplated. For instance, in the Coal Mines Act, 1911, s. 94, sub-s. 2, there is mentioned "the immediate employer of every boy, other than the owner, agent, or manager of the mine." This is a section reproducing s. 8, sub-s. 2, of the Coal Mines Regulation Act, 1887. In *Marrow* v. *Flimby and Broughton Moor Coal and Fire Brick Co.* (1) both A. L. Smith L.J. at p. 600 and Rigby L.J. at p. 603 pointed to that section of the Act of 1887 as one recognizing employers of labour in a mine other than the owner, agent, or manager. Again, s. 22 of the Act of 1887 speaks of a person employed by "a contractor for mineral." That expression "contractor for mineral" in my opinion means a person who under contract works the mines. That it was so understood by Rigby L.J. appears from his reference to that section at [1898] 2 Q. B. at p. 603. The substance of s. 22 of the Act of 1887 is reproduced by s. 27, sub-s. 1, of the Act of 1911. The expression "contractor for mineral" is there dropped and the words are "the mine is worked by a contractor." The section speaks of a person employed by such a contractor. The meaning I think is the same as that of s. 22 of the Act of 1887, and the learned author of MacSwinney on Mines (see the 4th edition, p. 606) was evidently of that opinion. The language of the Coal Mines (Minimum Wage) Act, 1912, must be read in the light of these considerations. The respondents' contention is in fact that s. 1 of the Act of 1912 is to be read as a section imposing upon a colliery owner who before the Act had entered into no contract to pay wages to the workman an obligation to pay wages and to pay at not less than the

(1) [1898] 2 Q. B. 588.

C. A.
1913

RICHARDS v. WREXHAM AND ACTON COLLIERIES, LIMITED.
DAVIES v. SAME.

Buckley L.J.

minimum rate. The section has not, in my judgment, that twofold effect. It makes no alteration in the person liable to pay the wage (who in the section is called the employer), but affects the measure of the liability of such person as apart from the Act is liable to pay the wage.

The first of the district rules made under s. 2 of the Act of 1912, applicable to the district in which this colliery is situate, may be referred to as bearing upon the matter under consideration. Those rules fixed 6*s.* for colliers and 4*s.* 10*d.* for loaders or fillers as the minimum wage. Rule 1 of these district rules is as follows: "In ascertaining the earnings of colliers for the purpos the minimum wage there shall not be deducted from their gross earnings more than the minimum rates fixed by this board for the class of filler or other workmen employed by them." This rule may be summarized by saying that its effect is to provide that the amount by which the contractual wages of the filler exceed his minimum wage shall not be thrown upon the colliery owner by bringing that difference into account in determining what is due to the collier to make up the collier's minimum wage. Those who say that "employer" in s. 1 means colliery owner must say that that rule is ultra vires, for its application results in relieving the colliery company from bearing the difference between the filler's contractual wage and his minimum wage. If under s. 1 the colliery owner is liable to bear this difference, the rule must be ultra vires. If my view of the Act is right, the rule is not ultra vires. I refer to this not as determining the question as to the true meaning of s. 1. But it is not, perhaps, immaterial that if my view of the Act be right the rule is intra vires. So far as the statute is concerned then I think that the colliery owner is not liable.

If then the colliery owner is not liable by virtue of the Act, is he liable by virtue of contract outside the Act? Upon this question the learned judges from whom this appeal is brought lost sight, I think, of the point to be decided. The question is not whether the defendants employed the filler in the sense that they selected him, and could discharge him and control him in his conduct in the mine and so on, but whether the contract between the defendants and the filler was one under which the former became by promise enforceable in law liable to pay the latter wages. The filler signed terms of employment which contemplated that persons might be employed directly by the company or by chartermaster or other person. Those words grammatically and in my opinion in fact mean employed directly by the company or employed directly by chartermaster or other person. The employment might be either by the defendants or by the chartermaster. It remains a question of fact which of the two it was. Upon this the evidence is to my mind all one way. The obligation to pay is by witness after witness and indeed by the evidence of the plaintiff's own witnesses an obligation of the collier and of no one else. The evidence is that if the collier made no wages himself he would still have to pay the filler 5*s*. 9*d*. There is no evidence to the contrary, but whether that is so or not, there is certainly ample evidence to the affirmative of the proposition, and the county court judge and he alone is the person to say whether the obligation is not shewn to lie, not upon the defendants, but upon the collier.

I mention one further point to shew that I have not overlooked it. The price list of the mine includes "No. 14. Fillers working in hard or difficult places, or when taken out of their places to work for the company, to be paid at current rates, as per the basis of 1888." It is to be taken for the purposes of this case that the place was not a hard or difficult place. But for the purpose of construction No. 14 may be referred to, and in that sense some argument has been rested upon it. The contention is that because a wage is named for certain fillers therefore the colliery owner is contractually liable to all fillers. The contention seems to me unsound. One of the cases is when the filler is taken out of his place to work for the company. Of course the company would then be liable for his wages. And the fact that a stipulation is made that the company shall pay him then goes to shew that except under those circumstances it was not liable to pay him. It is unnecessary to decide whether the company is liable to the filler working in a hard or difficult place, but again the implication from that liability, if it exists, is that under other circumstances it does not exist.

In my judgment the appeal succeeds and should be allowed

C. A.
1913

RICHARDS v. WREXHAM AND ACTON COLLIERIES, LIMITED.
DAVIES v. SAME.

and judgment should be entered for the defendants, with the costs of the action, including the costs of this appeal.

KENNEDY L.J. read the following judgment:—This appeal involves the decision of two cases: the one an action brought by Edward Richards, and the other a similar action brought against the same defendants by James Davies. They have been dealt with by the Courts below together. I shall deal with the case of Edward Richards as governing both cases.

In July, 1912, the plaintiff, Edward Richards, sued the defendants in the Denbighshire County Court for a balance of wages alleged by the plaintiff to be due to him from them for four days' work in the preceding June as a filler in a mine of theirs. It is common ground that the right of the plaintiff to succeed in the action depends upon the plaintiff being able to prove a promise by the defendants to be liable to the plaintiff for the payment of wages; or, as it was put by the learned county court judge in his judgment, upon his establishing, in respect of remuneration, privity of contract between himself and the defendants. The learned county court judge, after hearing a good deal of evidence, decided that the plaintiff had failed to prove his point, and accordingly gave judgment for the defendants. On appeal, the Divisional Court, Ridley and Lush JJ., reversed this judgment. The defendants have appealed to this Court. It is, to my mind, most important to bear in mind that, the single issue in this case being an issue of fact, neither the Divisional Court nor this Court is entitled to disturb the judgment given in the county court, if there was evidence at the trial in support of the defendants' case such as, if the case had been tried before a judge and jury, would have justified the jury in finding a verdict in accordance with that judgment. It is, therefore, necessary to see what the facts, proved or admitted, were. I take the state of things as it existed at the time of the Coal Mines (Minimum Wage) Act, 1912, coming into operation.

In the defendants' collieries, the Wrexham and Acton Collieries, the coal is got by workers denominated indifferently colliers, contractors, or chartermasters. They are piece-workers; they are paid by the defendants weekly according to certain rates for the quantity of coal which is gotten by them, that is to say, hewn and sent up, to which is added a 50 per cent. allowance, and from which certain agreed deductions are made which it is unnecessary to specify. They generally work in groups called "setts." These setts may be composed of two or three or more colliers, and the practice is that some one member of the sett, who appears from the language of the witnesses to be specially styled the contractor, receives payment for the sett according to the figure appearing in a weekly pay ticket, of which several specimens were put in evidence. Each sett has a particular number, and a tally with that number is placed upon each tub when it is filled, so that when the tub is sent up the checkweigher may know to whom the coal in the tub is to be credited. The plaintiff did not belong to this class of workman. He was a "filler." One or more fillers may be attached to a sett of miners, the work of the filler being that of helper to the sett, loading the coal tubs for the sett with the coal as it is gotten by the sett. He is not a pieceworker. He receives remuneration weekly, at a daily rate which has varied in different collieries, but in these collieries the customary rate for fillers, established for some years before and until the Coal Mines (Minimum Wage) Act, 1912, came into operation, was *5s. 9d.* net. That weekly remuneration is paid to him by that member of the sett who, as I have said, received for the sett the weekly payment due from the defendants to the sett according to the amount of coal gotten by that sett. It never has been an item in the calculation of the wages paid by the defendants to the sett and entered in the weekly pay ticket, nor, in fact, until 1908 was there ever any recognized right of a sett, however little it might earn, to obtain from the owners of the colliery in which it worked any allowance in respect of the amount to be paid by the sett to the filler or fillers who loaded for that sett. In that year, in conformity with an arrangement between colliery owners and colliers in North Wales and elsewhere, if, and only if, the sett could shew that owing to a "hard or difficult place" they could not, in the language of some of the witnesses, "make" (or "make up") their wages after paying the filler or fillers loading for that sett, the defendants began to pay the sett such a sum as would give each collier in the sett *6s.*

a day after each filler loading for that sett had received from the contractor the current rate, which, as I have said, was in this colliery 5*s*. 9*d*. net. This was the position when the Coal Mines (Minimum Wage) Act, 1912, came into operation.

In regard to the position of the filler, otherwise than in respect to the payment of wages, the undisputed facts are, as I understand the evidence, these: The manager of the colliery admits him, and he signs a form of agreement of which a copy was put in evidence. The heading is "Terms of Employment." It is silent as to remuneration. Then the manager, either personally or through some subordinate official of the colliery, sends the man to some sett. He may continue with that sett or move—I assume with the consent of the colliery officials—to work for another sett. Some of the witnesses deposed to working for several setts in succession. If a sett to which he goes is dissatisfied with him, it asks the management for his removal. His dismissal from the colliery rests with the management.

So far I have been dealing with the facts which I understand not to be in controversy in regard to the relations in general of the defendants, the colliers or contractors, and the fillers in this colliery, towards each other, as they existed since 1908 and at the time at which the Coal Mines (Minimum Wage) Act, 1912, came into force. There are also undisputed facts in regard to the particular case of the present plaintiff, Edward Richards. He began to work in the defendants' colliery as a filler seven years ago. He "signed on," i.e., signed the document "Terms of Employment" to which I have already referred. He has worked as a filler with several setts, and at some date which does not appear definitely in the evidence was sent by the fireman, one of the subordinate colliery officials, to sett No. 32, and was working with that sett during the days of June last in respect of which his claim in this action arises. There are in this No. 32 sett four colliers, or, as they are described in the plaint note, "contractors." The plaintiff never made any bargain either with the defendants' officials or with any of the contractors for remuneration. He knew what his remuneration would be, for, as I have said, a daily rate of 5*s*. 9*d*. net has long been established, and he received pay at that rate during all the seven years. He has always been paid by John Jones, one of the four contractors in the sett, whom he calls "the contractor," and by nobody else. I think this case would present considerable difficulty if the evidence stopped here. But it does not. The defendants strongly rely upon evidence to which, as the point which we have to decide is whether or not there was no evidence to justify the conclusion at which his Honour Judge Moss arrived, it is, I think, my duty to refer with some particularity. The plaintiff, Edward Richards, in cross-examination said: "I should expect to be paid if contractor had not made enough to leave him wages after paying me. I should expect the contractor to pay." John Jones, the contractor (as the plaintiff called him), was called as a witness on the plaintiff's behalf. "I should have to pay the filler whether I got the wages or not. If next week I only got 1*l.*, and filler worked six days, I should have to find money, 5*s.* 9*d.*, out of my own pocket. I should ask colliery to make me up to minimum; if they agreed my day wage would be 6*s.*" James Davies, the plaintiff in the other action against the defendants, himself a filler of ten years' experience at this colliery, deposed: "No matter how good or how bad times are, I expect contractor to pay me 5*s.* 9*d.*; I look to contractor to pay me." Ernest Parry, another filler called by the plaintiff, said in the course of cross-examination: "If filler in next place to me got 6*s.* 2*d.*, I should not expect 6*s.* 2*d.* If fillers in next wicket get more than 5*s.* 9*d.* and I wanted increase I should ask the contractor." William Davies, a collier with twenty-six years' experience in this colliery, who attended as a witness of the defendants on subpœna, deposed in the course of his examination-in-chief: "Before the 'hard and difficult place' agreement"—the witness is referring, no doubt, to the arrangement in 1908 which I have already mentioned —"even if I didn't make wages, I always paid filler 5*s.* 9*d.*, or whatever the ruling percentages might be. I got nothing towards this from colliery company, and did not expect anything. When times have been good I have given something extra out of generosity. I have had experience under the 'hard and difficult place' agreement. Then wages were made up to contractor, 5*s.* 9*d.* filler, 6*s.* 1*d.* holer, less oil, but I still paid the 5*s.* 9*d.*" But perhaps the most striking evidence from witnesses was that given by John Hughes, a witness for the defendants on subpœna, who has been employed for thirty-eight years as a contractor in the defendants' colliery: "In old days paid filler 5*s.* 9*d.* whatever wages I had made. I would then go to management and get wages made up if I could. If I didn't I had to go without. William Davies is my filler now and last three years. We are all partners, fillers and all. There are seven of us; of these, two are fillers. If in a hard and difficult place, we should still all share, so the colliers would lose a bit. This is an arrangement between us and the fillers."

The quotations I have made so far have been from the evidence of men who were either contractors or fillers. A good deal of interesting evidence was also given by Mr. Arthur Leach, a mining engineer of great experience as a supervisor of collieries in North and South Wales, as well as in the north of England, and by Mr. Thomas Jones, who, first as a fireman and afterwards as an under-manager, has been in this colliery for twenty-eight years. I will, however, quote only two passages from the evidence of the latter witness: "Tonnage rate for coal in various seams has practically been the same all these years. On this tonnage rate the collier is paid, and he has to pay the holers and fillers. I don't know what the collier pays the holer and filler. Before minimum wage agreement for hard and difficult place colliers often short of wages. They always paid filler and then complained to management. If management did not make it good, the collier put up with the loss." Later on in his examination the witness added: "We don't fix wage of colliery filler."

I have felt it my duty to deal at length with these portions of the evidence at the trial which appears upon the notes of the learned county court judge, because I have arrived at a conclusion different from that at which the learned judges in the Court below arrived on this part of the case. I say "this part of the case," because I shall have further to consider as a distinct question the effect of the Coal Mines (Minimum Wage) Act, 1912.

The Divisional Court held that there was no real or substantial evidence upon which the learned county court judge could properly hold, as he did, that there was no contract for payment of wages between a filler and the defendants. I am of opinion that there was such evidence. If I rightly appreciate, as I ought to do, the judgments given in the Divisional Court, they are governed by the view that if you find, as you do in the present case, that the filler was authorized to work by the defendants, was sent to a sett by the defendants, and might be dismissed by the defendants, and by agreement in writing was bound whilst in the mine to conform to certain rules and regulations as to conduct in the mine, and if you find, further, that the contractors for whom he worked were themselves employed by the defendants, and therefore could not constitute independent contractors, then you must treat such circumstances by themselves, not merely as evidence, but as conclusive evidence of an implied promise to be liable to the filler for payment of remuneration. I cannot concur in this reasoning. Further, with all due respect, I think that the word "engaged," which I take from the judgment of my brother Lush, is a somewhat misleading term. I think that the true view of the facts, or at all events a view of the facts which, having regard to the evidence, the learned county court judge was entitled to take, is that the intending filler, who is sometimes a man suggested by the contractors and sometimes a man picked by the manager, has been accepted by the mine's manager as a person who will be permitted by the colliery owners to earn a filler's wage from a sett of contractors in the mine who want a filler in order that they may earn a tonnage wage upon certain conditions, those conditions being, in substance, to obey certain rules and regulations and to recognize the control of the defendants' officials and the defendants' right to dismiss. Too much stress may easily be laid upon the filler's signature to the document called "Terms of Employment," and the fact of the defendants' right of control over the filler in accordance with those terms. In *Fitzpatrick* v. *Evans & Co.* (1) a colliery record book containing terms of a somewhat similar sort was signed by a workman who was employed and paid by an independent contractor, who had agreed with the colliery in that case to sink and wall a shaft in the colliery. "It is for the safety and security of

---

(1) [1901] 1 K. B. 756; [1902] 1 K. B. 505.

C. A.
1913

RICHARDS v. WREXHAM AND ACTON COLLIERIES, LIMITED.
DAVIES v. SAME.

Kennedy L.J.

the mine that every one employed there shall be bound to conform to the rules, regulations and terms imposed by the colliery owners, whether he be their servant or not": per Wills J. (1) Mr. Leach, whom I have had occasion to mention as a witness in the present case, confirmed the statement of Wills J., when he deposed in the course of his evidence: "It is the universal practice for every person to sign on. This is for supervision. The management is responsible for the man; must have control for purposes of Mines Acts. Returns have to be made of conditions and number of persons employed." The fact that A. has authorized B. to work on A.'s premises under the control of A.'s servants, whether those premises be a colliery or any other kind of works, can be at the most an element which may properly be taken into consideration if B. claims that he is entitled to sue A. as liable, on an implied promise, to pay him for the work done on the premises. The same, in my opinion, is true of the fact upon which so much stress is laid in the judgments in the Divisional Court, that the collier is himself in the employ of the defendants, and not what is termed an independent contractor. I do not think that the attention of the Court can have been sufficiently drawn to the fact that several of the statutes relating to coal mines, as well as printed conditions used in this very colliery, recognize the employment by colliers, therein designated, as they are in the evidence in this case, "contractors," of persons such as their fillers and other helpers, and one of these statutes expressly refers to the payment of the fillers and other helpers by such contractors.

(1.) The Coal Mines Regulation Act, 1887, s. 22, provided that a contractor for mineral, or person employed by such a contractor, is not eligible for the post of manager or under-manager under that Act. (2.) The Coal Mines (Weighing of Minerals) Act, 1905 (5 Edw. 7, c. 9), s. 2, sub-s. 2 (which is still, I believe, in force), enacts—and this appears to me to be most significant and material—"Where there are persons employed in a mine who are employed by a contractor who is himself paid according to weight of mineral gotten, such persons, if they are either in charge of the working places or are holers, fillers, trammers, or brushers, shall, notwithstanding that they are paid by the contractor and otherwise than in accordance with the weight of mineral gotten, be deemed to be included among those who are entitled to appoint a checkweigher, and from whom he is entitled as aforesaid to recover wages or recompense; but the proportion of such wages or recompense recoverable in respect of such persons shall be paid by the contractor who employs them, and recoverable by the checkweigher from him alone." (3.) The Coal Mines Act, 1911, which repealed the whole of the Act of 1887, except only six sections, provides (inter alia) in s. 27 (by way of substitution for s. 22 of the earlier Act which I have cited above) that no contractor, nor any person employed by him, shall be appointed to be manager, under-manager, or fireman, examiner, or deputy of the mine. (4.) We have before us a printed document entitled "Conditions of Employment at the Wrexham and Acton Collieries for all persons employed at the collieries and works directly or indirectly." The body of the document contains six regulations requiring all persons employed at the works, directly or indirectly, to be members of a certain Permanent Relief Society, and directions containing other matters which have no bearing upon the question we are now considering. But it then proceeds to make a regulation, No. 7, expressly headed "For miners and contractors only," and commencing: "Every miner and contractor employed at the colliery shall upon engaging any filler, drawer, workman, or other person to work under him, and before employing such filler, drawer, workman, or other person, require such filler, drawer," &c., and regulation No. 8, headed "For fillers, drawers, and persons working under contractors only," commences: "Every filler or drawer employed by any miner, and every workman or other person employed by a contractor at the colliery, shall," &c.

---

(1) [1901] 1 K. B. at p. 762.

When you closely examine the facts to which the Divisional Court has given predominance—the original engagement, as it is called, of the filler by the mine manager, the control by the mine officials, and the power of those officials to terminate his employment in the mine—and consider them in connection with the statutes which I have cited, and with what I may call the peculiar conditions of mining industry, there was nothing, as it

C. A.
1913

RICHARDS v. WREXHAM AND ACTON COLLIERIES, LIMITED.
DAVIES v. SAME.

Kennedy L.J.

appears to me, to disentitle the learned county court judge, in deciding the single question before him, from giving effect to the strong case for the defendants which the oral evidence presented. The single question was: Was this filler's contract, in regard to remuneration, a contract with the defendants? And I think that he was justified in arriving at the conclusion that it was not. It was agreed between the parties that for the purpose of the present case he was not to treat the question as arising in regard to the special case of payment in respect of work in "hard or difficult places." That particular case under the rules made for this district under the provisions of the Coal Mines (Minimum Wage) Act, 1912, might—I say no more—conceivably be treated as one which admits of exceptional treatment. But it is common ground that it was not the case which the learned county court judge had to deal with.

There remains to be considered the point upon which the respondents to this appeal laid stress, of the effect of the Coal Mines (Minimum Wage) Act, 1912. They contend that, even if before that Act came into operation there was no contractual relation between the filler and the colliery owner in regard to the payment of wages to the filler, that Act, at all events, brought such a relation into existence. Sect. 1 provides that, except in certain circumstances which do not exist in the present case, "it shall be an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to that workman wages at not less than the minimum rate settled under this Act and applicable to that workman." Sect. 2, sub-s. 1, provides that "nothing in this Act shall prejudice the operation of any agreement entered into or custom existing before the passing of this Act for the payment of wages at a rate higher than the minimum rate settled under this Act, and in settling any minimum rate of wages the joint district board shall have regard to the average daily rate of wages paid to the workmen of the class for which the minimum rate is to be settled." By s. 2, sub-s. 2, joint district boards are created to make rules for the several districts which are enumerated in the schedule to the Act. The joint district board which had to make rules for the area in which the defendants' colliery is situated was the North Wales joint district board. By the same section (s. 2, sub-s. 2) each joint district board is to be a "body of persons . . . . which in the opinion of the Board of Trade fairly and adequately represents the workmen in coal mines in the district and the employers of those workmen." By s. 4, sub-s. 2, if the joint district board fails within three weeks after its recognition as a joint district board to settle the first minimum rates of wages and district rules for that district, the chairman is himself to settle the rates or rules. In the North Wales district the chairman had, under the last-mentioned section, to settle the rates and the rules. And amongst the rules and rates settled by him are the following:—Rule 1: "In ascertaining the earnings of colliers for the purposes of the minimum wage, there shall not be deducted from their gross earnings more than the minimum rates fixed by this board for the class of filler or other workmen employed by them." Rule 16 provides (inter alia) that general minimum rates of wages are to apply to all coal mines in the district, and to all workmen employed therein: colliers 6*s.*, loaders 4*s.* 10*d.* Loaders I understand to be identical with fillers. I have cited, I think, all parts of the Act and of the rules made for the North Wales district that are relevant to the present case.

The contention of the plaintiff's counsel is that this Act has given the filler, as a "person employed in a coal mine below ground" (s. 5), the right, whether he had it before or not, to sue the colliery owner directly for wages. Reliance for the support of this contention is placed upon two matters in the Act: first, upon the language of s. 1, which I have already quoted; secondly, upon what I may term the constitution of the joint district boards which are to represent two classes, the employed, i.e., all underground workers, on the one hand, and the employers on the other; whence it is argued it may be inferred that the Act does not recognize any third class, namely, workmen, i.e., colliers, who hold, say the plaintiff's counsel, if the defendants' contention is right, a double position as employers of fillers and employees of the colliery owner.

The argument sought to be drawn from the rules, if I rightly understood it, is that as by rule 1 in ascertaining the earnings of

C. A.
1913

RICHARDS v. WREXHAM AND ACTON COLLIERIES, LIMITED.
DAVIES v. SAME.

Kennedy L. J.

the colliers for the purposes of the minimum wage nothing more than the minimum rates fixed by the board for the class of filler or other workman employed by them is to be deducted, and by rule 16 the loader's, i.e., the filler's, minimum rate is fixed at 4*s.* 10*d.*, the difference at any rate between this 4*s.* 10*d.* and the customary rate of 5*s.* 9*d.* net (which s. 2, sub-s. 1, of the Act maintains) must come from the colliery owner to the filler. I am unable to accept this reasoning. I do not think that s. 1 of the Act can properly be construed as creating a contract for payment where none existed before. It applies, in my view, only to such contracts of employment as at the time of the passing of the Act included a contract for payment of wages, and enacts that in regard to such contracts of employment it shall thenceforward be an implied term that the wages paid shall never fall below a certain minimum rate to be settled under the Act. So far as regards the institution of the joint district boards, I agree that the Act treats as the two component elements, on the one hand the colliery owners as the employers, and on the other hand all underground workmen as the employed; but I do not think that an alteration changing, if I may so put it, the paymaster of the filler or other helper of the collier can properly be inferred from the adoption by Parliament of this scheme of representation. In creating a body which shall adjust the possibly conflicting interests of the colliery owners on the one hand and the workers on the other, Parliament may have reasonably held it sufficient to divide the representation between those two classes. That fact appears to me to form no sound basis for holding that the Legislature intended to transfer to the colliery owner the liability to pay the filler and to relieve the collier or contractor, on whom, as I have already said, it rested up to that time. In regard to the rules I am unable to see any sound support for the plaintiff's argument. They do not prescribe, and in my view it was not within the power of the joint district board to prescribe, by whom the wages of the filler at not less than the minimum rate settled by the rules should be paid. As I have already said, the Court is not to deal with this case as one of a "hard or difficult place." The issue is the general one, as to whether there is a contractual liability of the colliery owner for the payment of

C. A.
1913

RICHARDS v. WREXHAM AND ACTON COLLIERIES, LIMITED.
DAVIES v. SAME.

wages to persons in the position of these plaintiffs. The language of rule 1, so far as it goes, rather, I think, assists the defendants in the present case, for in regard to the colliers it speaks of "the class of filler or other workmen employed by them."

In my opinion, this appeal ought to be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Griffiths & Roberts, for W. Wynn Evans, Wrexham.*

Solicitors for defendants: *Rawle, Johnstone & Co., for Peace & Ellis, Wigan.*

W F B.

C. A.
1913
Dec. 10, 11, 20.

[IN THE COURT OF APPEAL.]

In re RONEY & CO., SOLICITORS.

Solicitor—Bill of Costs—Shorthand Notes—Solicitor and Client—Taxation.

An insurance on goods against fire was effected with three insurance companies. A fire occurred and a claim was made in respect thereof which was referred to arbitration. One of the companies (called the leading company) was entrusted with the conduct of the defence on behalf of all the companies. At the commencement of the arbitration it was agreed between counsel and solicitors on both sides that one shorthand writer should be employed to take a note of the proceedings, the expense to be shared equally by both parties, and that a transcript should be supplied day by day to the arbitrator, who said that it "is in most cases very desirable; it shortens the case." There was no agreement or order by the arbitrator that the costs of the shorthand notes should be costs in the cause, nor were the clients told that the costs might not be allowed on taxation as between party and party. The case lasted several days and a number of expert witnesses were called, and an award was made in favour of the claimants with costs. Upon taxation as between party and party the claimants' share of the costs of the shorthand notes was disallowed. Upon taxation as between solicitor and client of the insurance companies' solicitors' bill of costs the taxing Master disallowed the costs which the solicitors had paid of one-half of the shorthand notes:—

Held by Buckley and Kennedy L.JJ., Vaughan Williams L.J. dissenting, that these costs were properly disallowed.

APPEAL from an order of Bucknill J. at chambers refusing to direct a review of taxation of costs.

Three insurance companies, the National General Insurance Company, Limited, the British Crown Assurance Corporation, Limited, and the Empire Guarantee and Insurance Corporation, Limited, were co-insurers of the contents of a warehouse against fire, the three companies taking respectively seven-sixteenths, six-sixteenths, and three-sixteenths of the risk. A fire having occurred in the warehouse, the parties were unable to agree as to the amount of the damage, and the matter was referred under a clause in the policy to a barrister, as sole arbitrator By arrangement between the three insurance companies the National General Insurance Company, as the company which had undertaken the greatest risk (herein called the leading company), was entrusted with the conduct of the arbitration proceedings on behalf of the insurance companies, and their solicitors, Messrs. Roney & Co., were retained to act on behalf of each of the three companies, each company agreeing to pay their pro rata share of the expenses incurred. At the commencement of the arbitration proceedings the question of taking a shorthand note of the proceedings arose, and the shorthand note of what then took place was as follows :—

" Mr. Thorn Drury "—who appeared as counsel for the claimants, the assured—" Before we decide anything there is one matter I might mention. We have a shorthand writer here, and I see that the insurance company have got a shorthand writer. It is obviously undesirable to have two shorthand notes taken. I do not know whether we could come to any agreement with regard to taking a shorthand note for your use ; it seems to me it would shorten the proceedings very considerably. If we had a shorthand note taken and a transcript given to you within a reasonable time, I think it would be of great assistance to you, Sir.

" The Arbitrator—That is in most cases very desirable ; it shortens the case.

" Mr. Thorn Drury—I do not know what the other side have to say about it.

" Mr. Roney "—the solicitor for the insurance companies—" Yes, we will share with the other side.

" Mr. Thorn Drury—I suggest that the two shorthand writers should divide it in the way that is usual with them."

Later Mr. Thorn Drury said: "Then I will very shortly open the case and call my first witness. I understand it is agreed that the shorthand note shall be taken jointly upon the terms which the shorthand writers understand, and the transcript is to be furnished to the arbitrator. You agree to that?

"Mr. Eames"—who appeared with Mr. Norman Craig, K.C., as counsel for the insurance companies—"Certainly."

This took place in the presence of Mr. Parsons, the managing director of the National General Insurance Company, as well as of the counsel and solicitors on both sides. A shorthand note of the evidence and proceedings was taken and a transcript was supplied to the arbitrator day by day and to the counsel in the case, and was used as the notes of the proceedings. There was no express agreement between the parties that the costs of the shorthand notes should be costs in the cause.

The arbitration lasted twenty-one days and a number of experts were called as to the amount of the damage. In the result the arbitrator made an award in favour of the claimants for a sum considerably less than that claimed, with costs. He made no order as to the costs of the shorthand notes. Upon the taxation of the claimants' costs as between party and party the taxing Master disallowed the sum of 272*l.* 12*s.* 2*d.*, being one-half the costs of the shorthand notes. Messrs. Roney & Co. sent in their bill of costs as between solicitor and client to the insurance companies, and it contained two items, namely, 210*l.* for "instructions for brief," and 272*l.* 12*s.* 2*d.*, being one-half of the costs of the shorthand notes. The British Crown Assurance Corporation objected to these items, and they obtained an order for the taxation of the bill. Upon taxation the taxing Master allowed the sum of 157*l.* 10*s.* for "instructions for brief," thus disallowing in respect of this item the sum of 52*l.* 10*s.*, and after hearing evidence on behalf of Messrs. Roney & Co. and the British Crown Assurance Corporation and the Empire Guarantee and Insurance Corporation, he disallowed the whole of the item in respect of the costs of the shorthand notes. Messrs. Roney & Co. carried in objections to the disallowance of these two items. The objection to the disallowance of the 52*l.* 10*s.* for "instructions for brief" was based mainly upon the labour and trouble involved in preparing the defence in respect of the very large number of items of claim. The objection to the disallowance of the 272*l.* 12*s.* 2*d.* in respect of one-half of the costs of the shorthand notes was based upon the agreement made in open Court as to taking a shorthand note and the use of a transcript by the arbitrator in substitution for his note, the shorthand note thus constituting the record of the evidence and relieving the arbitrator from the necessity of taking a note; and it was submitted that, having regard to the importance and complexity of the issues involved and the exhaustive nature of the inquiry, the taking of a shorthand note was indispensable and the means of saving a great expense, and was also proper to be allowed on the following grounds:—(*a*) As authorized by the leading office in control of the litigation on behalf of the then respondents. (*b*) As within the principle of law enunciated in *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (1), as ratified in subsequent cases.

The taxing Master in his answer to the objections stated, as to the disallowance of 52*l.* 10*s.* for "instructions for brief": "I have carefully considered the allowance and consider it reasonable and sufficient. It is larger than that allowed by me on the party and party taxation." As to the disallowance of the costs of the shorthand notes he stated: "I do not think the arrangement for taking a shorthand note as shewn on pp. 5 and 7 (2) of the transcript formed such an agreement as to bring this case within *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (1) and *Hebert* v. *Royal Society of Medicine.* (3) I think the arrangement was only the very usual one to employ one shorthand writer instead of two. I think this case is more in accordance with *Jones* v. *Llanrwst Urban Council.* (4) The representatives of the British Crown and Empire Guarantee Companies have given evidence that no authority was given on behalf of their companies for the employment of a shorthand writer, and that they should not have given any such authority except on instructions from their companies. They also contested the right of the leading company to incur such a large item of expenditure without instructions from the other companies. These objections are for the reasons given above overruled."

---

(1) [1899] 2 Q. B. 488.

(2) This is the portion of the shorthand note which is set out above.

(3) (1911) 56 Sol. J. 107.

(4) [1911] 1 Ch. 393.

Bucknill J. at chambers refused to order a review of taxation. Roney & Co. appealed.

Bromley Eames, for the appellants. With regard to the disallowance of 52*l.* 10*s.* in respect of "instructions for brief," the taxing Master has applied a wrong principle. He has stated on the face of his answer to the objection that the amount allowed, 157*l.* 10*s.*, is larger than that allowed by him on the party and party taxation. That is a wrong principle to apply. The proper principle is to inquire what expenditure was reasonable and necessary for the purpose of the insurance companies' case, and not to regulate the amount allowed to their solicitors for preparing their case by that which is allowed to the claimants' solicitors for the purpose of preparing the claimants' case. This item should therefore be sent back to the taxing Master for a review of taxation.

With regard to the disallowance of the costs of the shorthand notes, there was no agreement between the parties that the costs should be costs in the cause, nor was there any order by the arbitrator allowing the costs. The appellants therefore properly objected on taxation between party and party to the claimants recovering their share of the cost of the shorthand notes: *East London Ry. Co.* v. *Thames Conservators.* (1) That does not affect the appellants' right to recover from their clients the amount paid by them to the shorthand writer. The shorthand note here was taken on behalf of both parties to the arbitration at joint expense, with the approval of the arbitrator, who was furnished with a copy of the transcript day by day, and the note so taken was treated as the judicial record of the proceedings, and the cost thereof is recoverable by the solicitors from their clients: *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (2); *Hebert* v. *Royal Society of Medicine.* (3) The taking of the shorthand note was for the advantage of the clients, as otherwise the case would have lasted much longer, and the clients were thereby saved expense. It was therefore a "proper" expense to incur and the taxing Master ought to have allowed it under Order LXV., r. 27 (29). *Jones* v. *Llanrwst Urban Council* (1) was a case of taxation as between party and party and does not affect this case. The decision in *In re Blyth and Fanshawe* (2), which was approved in *In re Broad and Broad* (3), does not apply. It was there decided that where a solicitor incurs an unusual expense, such as having a shorthand note of the evidence in an ordinary action taken, he will not be allowed on taxation between solicitor and client the cost thereof, even though the client authorized him to employ a shorthand writer, unless he has explained to his client that the cost thereof may not be allowed on taxation as between party and party, and that therefore he may have to pay the cost thereof even if he succeeds in the action. That decision only applies where the taking of the shorthand note is an unnecessary and unusual expense. The decision in *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (4) shews that there is a class of case which is outside the decision in *In re Blyth and Fanshawe* (2), where the cost of a shorthand note of the evidence is treated as a usual and proper expense. The present case comes exactly within the decision in *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (4) In such a case it is not necessary to prove that the client gave special authority to the solicitor to incur the expense of a shorthand note, but if it is necessary it is clear that the leading company gave such authority, and as they had the conduct of the proceedings that binds the other two companies. The decision of the learned judge, refusing to order a review of taxation, was wrong.

---

(1) (1904) 48 Sol. J. 492.
(2) [1899] 2 Q. B. 488.
(3) 56 Sol. J. 107.

E. D. Chetham Strode, for the British Crown Assurance Corporation. With regard to the "instructions for brief," the first sentence of the taxing Master's answer to the objections gives his reason for disallowing 52*l*. 10*s*. of this item, namely, that the amount allowed is reasonable and sufficient. To that he has added something which is irrelevant and which may therefore be struck out. It does not affect the perfectly good reason

(1) [1911] 1 Ch. 393.
(2) (1882) 10 Q. B. D. 207.
(3) (1885) 15 Q. B. D. 252, 420.
(4) [1899] 2 Q. B. 488.

previously given. The Court will not interfere in a matter of quantum.

With regard to the costs of the shorthand notes, prima facie a shorthand note is an unusual expense which the solicitor cannot recover from his client. The decisions in *In re Blyth and Fanshawe* (1) and *In re Broad and Broad* (2) shew that a solicitor cannot recover from his client the cost of taking a shorthand note of the evidence unless he has not only informed his client of it and obtained his authority to incur the expense, but has also told him that, even if he succeeds in the action, such expense will or may not be allowed on taxation between party and party, and that he may therefore have to bear the expense himself. Admittedly that was not done in this case. It is sought, however, to bring the case within the principle laid down in *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (3) In order to bring the case within that decision it must appear that the judge at the trial has applied his mind to the question whether the case is of such a character that a shorthand note is necessary for the purpose of the case: *Jones* v. *Llanrwst Urban Council.* (4) The expense then becomes a usual expense. *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (3) was the case of a patent action, and the learned judge at the trial seems to have suggested that a shorthand note should be taken, and it was taken and used by the judge and the parties as the record of the evidence. The judge there applied his mind to the question whether a shorthand note was necessary. In the present case there was a claim on a policy of insurance against fire, which is a very common kind of case, and the arbitrator merely acquiesced in the taking of a shorthand note, and did not sanction it in the sense in which that word is used in *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (3) The facts in the present case are very like those in *In re Blyth and Fanshawe.* (1) In that case there was a long arbitration, and the shorthand notes of the evidence were used by the arbitrator and by the counsel, and also by the client himself who gave authority to the solicitor to employ a shorthand writer; and yet it was held that the solicitor could not recover the cost thereof from his client because he had not informed the client that the cost might not be recovered from the opposite party on taxation. Even if in the present case the leading company had authorized the expense of taking a shorthand note after full explanation given to them, the other two companies would not have been bound by that. The leading company were only the agents for the other two companies to incur all usual expenses and had no authority to incur an unusual expense. This, however, does not arise. The order of the learned judge was therefore right.

---

(1) 10 Q. B. D. 207.

(2) 15 Q. B. D. 252, 420.

(3) [1899] 2 Q. B. 488.

(4) [1911] 1 Ch. 393, at p. 413.

Bromley Eames in reply. The arbitrator here gave sufficient sanction to the taking of the shorthand notes to bring the case within the decision in *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (1) It is sufficient if the parties agree to have a shorthand note taken and the judge sanctions it, and the note so taken is used as the judicial record of the proceedings at the trial. [*Neale* v. *Gordon Lennox* (2) was also referred to.]

Cur. adv. vult.

Dec. 20. VAUGHAN WILLIAMS L.J. read the following judgment:—This is an appeal from the decision of the taxing Master with regard to two items in a bill of costs being taxed as between solicitor and client.

There are two objections which are made by the solicitors: (1.) to the reduction of the charge "instructions for brief"; (2.) a total exclusion of the charge for disbursement in respect of the taking at the arbitration of a shorthand writer's note.

The Master's answers to the objections run thus: "I have carefully considered the allowance and consider it reasonable and sufficient. It is larger than that allowed by me on the party and party taxation. I do not think the arrangement for taking a shorthand note as shewn on pp. 5 and 7 of the transcript formed such an agreement as to bring this case within *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (1) and *Hebert* v. *Royal Society of Medicine.* (3) I think the arrangement was

(1) [1899] 2 Q. B. 488.

(2) [1902] A. C. 465.

(3) 56 Sol. J. 107.

only the very usual one to employ one shorthand writer instead of two. I think this case is more in accordance with *Jones* v. *Llanrwst Urban Council.*(1) The representatives of the British Crown and Empire Guarantee Companies have given evidence that no authority was given on behalf of their companies for the employment of a shorthand writer, and that they should not have given any such authority except on instructions from their companies. They also contested the right of the leading company to incur such a large item of expenditure without instructions from the other companies. These objections are for the reasons given above overruled."

Before dealing with the question of the disallowance of disbursement of the solicitors for shorthand writer's note, I think it better at once to say a word as to the Master's answer in respect of the reduction of the amount claimed for instructions for brief. The objection was based on the nature of the case, which occupied twenty-one days' evidence before the arbitrator, who, together with the counsel engaged, had copies of the transcript of the shorthand notes delivered daily, and upon the nature of the evidence, which included fourteen experts, and included the preparation of the defence of all three respondents. I will deal with the relative position of the three respondents when I come to speak of the next objection. It seems to me that the Master's answer to the first objection is absolutely irrelevant, and the Master does not seem to give any other answer so far as the reduction of the charge in the solicitors' bill for instructions for brief is concerned; and I suppose that we must read it as meaning "I thought and think that the sum I allowed is sufficient." My own opinion is that for the reasons set forth in the objection, which I think we must take as true in fact, this charge of 52*l.* 10*s.* was not prima facie excessive. It is not usual to overrule the taxing Master's decision as to questions of amount, but I think one is justified in so doing in a case like this, where he gives no reasons for the reduction of the amount except the utterly irrelevant reason that the allowance was larger than that allowed on party and party taxation, which may in fact have been the reason of his decision. I see no reason for supposing the sum is excessive, but I suppose the proper course is to send this item back to the Master to deal with.

---

(1) [1911] 1 Ch. 393.

Now, as to the disbursement for the shorthand writer's notes, this is a case in which three companies are interested in different proportions. They are the National General Insurance Company, the British Crown Assurance Corporation, and the Empire Guarantee and Insurance Corporation, who took respectively seven-sixteenths, six-sixteenths, and three-sixteenths of the risk which formed the subject-matter of the arbitration proceedings. It was agreed between the parties that the National General Insurance Company, whose solicitors were Messrs. Roney & Co., the appellants, should conduct the arbitration as the leading company. This arrangement is set forth in the letters of May 24, 1909, the British Crown Assurance Corporation to Roney & Co., and May 25, Roney & Co. to the British Crown Assurance Corporation. In the argument before us it was admitted by the counsel appearing for the British Crown that under the arrangement the National General Company had, as between themselves and the British Crown, full control of the litigation, and that, if the National General authorized the taking of the shorthand note of the proceedings, this authorization bound the British Crown and constituted an express authority to Roney & Co. to order the taking of the shorthand note and the making of the daily transcript. The question therefore is, Did the National General authorize the taking of the shorthand note? The National General in fact do not dispute that authorization. The arrangement for taking the shorthand note was made in open Court, in the presence of the solicitors and counsel of both sides. The transcripts were furnished day by day to the arbitrator and to the respective counsel. It is said, and I think truly said, that these facts do not amount to an authority by the company, but at the time the arrangement was made the counsel for the National General and all the respondents made the arrangement for the taking of the shorthand note in the presence of Mr. Parsons, the manager of the fire department of the National General, who had been in the habit from time to time of attending the consultations prior to the commencement of the arbitration. The agreement made in Court was made as follows: [His Lordship read the passage from the shorthand note set out above.] All this took place in the presence of Mr. Parsons, and he made no objection, and the company of which he was managing director take no objection to the charge for the shorthand writer's note. It is said that to allow those costs is at variance with the conclusion of the Court of Appeal in *In re Blyth and Fanshawe* (1), but in *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (2) A. L. Smith L.J. says that *In re Blyth and Fanshawe* (1) "applies only to ordinary cases where it is not essential to have a shorthand note taken, and where in consequence the judge is able to take a sufficient note at the trial. There I agree costs of a shorthand note cannot be recovered without a special order of the judge at the trial. But such cases do not hit the present case, where it is clear from what took place at the trial that the parties and their counsel with the assent of the judge all agree that a shorthand note is necessary and essential. In my judgment, it would be an iniquity in a case like this to make the solicitor pay the costs of the shorthand note out of his own pocket. These costs must therefore be allowed on the taxation." (3) As A. L. Smith L.J. limits the application of the rule laid down by Baggallay L.J. and Lindley L.J. in *In re Blyth and Fanshawe* (1) to ordinary cases in which the shorthand writer's note would be an unusual or extraordinary expense, we have in the present case to ask ourselves whether in an arbitration which occupied twenty-one days and necessitated the calling of fourteen expert witnesses it was "an unusual or extraordinary expense" to employ the shorthand writer to take notes of the evidence. It is plain that the arbitrator, the counsel engaged on both sides, and the managing director of the National General Company, all thought it was a necessary and useful expenditure, which would be likely to lessen the expenses of the arbitration, and did in fact do so. It is to be observed that in *In re Blyth and Fanshawe* (1) there were two taxations; the first was a taxation of the successful

---

(1) 10 Q. B. D. 207.

(2) [1899] 2 Q. B. 488.

(3) The Lord Justice was quoting from the report of the case in 81 L. T. 254, at p. 256.

C. A.
1913

RONEY & CO., *In re.*

Vaughan Williams L.J.

plaintiff's costs as between party and party, and the costs of obtaining the shorthand notes were disallowed. Then came the second taxation as between solicitor and client, in which again the costs of the shorthand writer's note were disallowed, this time between solicitor and client. I can only say with regard to this case and to *In re Broad and Broad* (1) that I entirely approve of the rule therein laid down, but I think, as A. L. Smith L.J. did, that it is inapplicable in a case which is not an ordinary case, but a case coming within the same principle as applied in patent cases, in which case it is not necessary for the solicitor to explain to his client that the costs may not be allowed on party and party taxation. This last qualification only applies to ordinary cases.

If the notes by consent of both sides and the counsel on both sides, with the approval of the arbitrator, are agreed to be substituted for the personal note of the arbitrator, which I do not find to have been the case in *In re Blyth and Fanshawe* (2), it has been the practice in this Division of the Appeal Court to allow the costs of the shorthand writer's note even on party and party taxations: see *Hebert* v. *Royal Society of Medicine.* (3) Of course, if the usual practice of a particular judge in his Court is to disallow the costs of the shorthand writer's note, even though used by the judge as a substitute for his own note, not for the convenience of the judge but for the convenience of the parties, such costs would be disallowed as between party and party. The case of *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (4), in my opinion, is this case, and therefore I think that the costs of the shorthand notes should be allowed, and that this appeal succeeds.

Buckley L.J. read the following judgment:—In a taxation between solicitor and client, the solicitors object to disallowances made by the Master in respect of two items, and apply to review. The judge has dismissed the summons to review. The solicitors appeal.

The first is a disallowance of 50 guineas, part of a sum of

---

(1) 15 Q. B. D. 252, 420.

(2) 10 Q. B. D. 207.

(3) 56 Sol. J. 107.

(4) [1899] 2 Q. B. 488.

200 guineas charged in the bill for instructions for brief. The taxing Master answers: "I have carefully considered the allowance and consider it reasonable and sufficient." The matter is wholly one of quantum, and this answer I think concludes the matter unless there is something more, for the Court does not interfere in respect of quantum. A contention is raised, however, upon the next sentence in the taxing Master's answer. He says: "It is larger than that allowed by me on the party and party taxation." This seems to me to be an irrelevant statement of an immaterial arithmetical fact. It is a statement that for certain work done by the defendant's solicitor for the defendant the Master has allowed a larger sum than as between party and party he allowed for similar work done by the plaintiff's solicitor for the plaintiff. This is no reason at all upon the question of what ought to be allowed as between the defendant and his solicitor. Express it as a reason and the absurdity is obvious: "I allowed the defendant's solicitor a certain sum because it was a larger sum than I had allowed the plaintiff's solicitor for different but similar work." This is no reason at all for the amount allowed to the defendant's solicitor. It is a sort of conciliatory and irrelevant statement, intended, I suppose, to impress upon the defendant's solicitor that he really has nothing to complain of.

The second is a disallowance of 272*l.* 12*s.* 2*d.* for half shorthand writer's charges. The law to be applied upon this question is, I think, as follows. It was decided in *In re Blyth and Fanshawe* (1), an authority emphatically affirmed in *In re Broad and Broad* (2), that a solicitor cannot charge his client with an unusual expense even when the client knew that the expense was being incurred and authorized the solicitor to incur it, unless the solicitor explained to the client that whatever was the result of the action he would have to bear that unusual expense himself. The case is extraordinarily strong. The shorthand notes were used by the arbitrator, by the client's counsel, and by the client himself, and the Court proceeded upon the footing that the client authorized the solicitor to employ the shorthand writer, but nevertheless the solicitor was not allowed the expense because the above information was not given.

---

(1) 10 Q. B. D. 207.
(2) 15 Q. B. D. 252, 420.

In the present case it is not proved that the client authorized the employment of the shorthand writer, and, even if he did, it is not proved that it was explained to him that whatever was the result of the action he would have to bear the expense himself. So far therefore the solicitor fails. But the solicitor may still be entitled to the amount upon the ground that the expense is not an unusual expense (for it is to that case that *In re Blyth and Fanshawe* (1) applies) but is a reasonably necessary and proper expense. If that is established, then the solicitor is entitled to charge the client upon the ground that it is within the authority of the solicitor to incur all reasonably necessary and proper expense in the conduct of the proceedings. *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (2) is a case in which the solicitor succeeded upon that ground. The Court was satisfied that the cost of a shorthand note was in that case not an unusual and unnecessary expense. A. L. Smith L.J. says (3) that it was a case "where a shorthand note is absolutely essential, and counsel agree in Court with the sanction of the judge that one shall be taken and used as the record of the trial." The judge may in any case, if he finds it to be the fact, determine that costs of this kind are necessary and proper costs. One indication of his being of that opinion would be that he directs such costs to be costs in the action. He may, however, refuse so to do notwithstanding that the note was taken by agreement of both sides and was to be used as a substitute for the judge's note in the action and upon an appeal if any: *Jones* v. *Llanrwst Urban Council.* (4) The question in the present case I think is whether there was any such determination by the arbitrator, and, if there was not, then whether it is in any other way shewn that the expense was a reasonably necessary and proper expense. As to the former of these, that which took place before the arbitrator did not in my judgment amount to making the costs costs in the arbitration. I think the taxing Master is right that the arrangement was only the very usual arrangement to employ one shorthand writer for both parties instead of one for each. It is material, though not decisive of this case, that upon the party and party taxation the present claimants successfully contended that the costs of the shorthand notes were not costs in the cause, that is, were prima facie not costs reasonably necessary and proper to be incurred. Are there then special circumstances for saying that it was reasonably necessary to employ a shorthand writer? The taxing Master is of opinion that there are not, for he has disallowed them, and under Order LXV., r. 27 (29), it is his duty to "allow all such costs, charges, and expenses as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the taxing Master to have been incurred or increased through over-caution, negligence or mistake, or by payment of special fees to counsel or special charges or expenses to witnesses or other persons, or by other unusual expenses." This being so, he has disallowed them. The only ground assigned is that this was a long arbitration, and that a shorthand note saved or may have saved time. I certainly am not prepared to hold that in an arbitration or an action which takes a long time the solicitor on that ground, without more, has authority to involve his client in the expense of shorthand notes. This case is, I think, governed by the principle of *In re Blyth and Fanshawe* (1) and *Jones* v. *Llanrwst Urban Council.* (2)

---

(1) 10 Q. B. D. 207.

(2) [1899] 2 Q. B. 488.

(3) Ibid. at p. 495.

(4) [1911] 1 Ch. 393.

The appeal I think fails and must be dismissed.

KENNEDY L.J. read the following judgment:—I see no ground for interfering with the decision of Master Philpot in regard to his disallowance of a part of the appellants' charge for instructions for brief. The question is one of quantum, and the taxing Master has assigned a perfectly proper reason for the disallowance of which the appellants complain, namely, that he has carefully considered the matter of amount, and finds that the sum he has allowed is reasonable and sufficient. In such a state of things it would not, I think, be right to interfere with the discretion exercised by the taxing Master. The appellants rely upon a sentence which follows, and which runs: "It is larger than that allowed by me on the party and party taxation." Such a consideration, if any effect were given to it by the learned Master, would be plainly so improper that I do not think it would be just to impute to him that which the learned counsel for the appellants suggests, namely, that this sentence was meant by him to state a reason for the amount allowed on this item. The remark of which it consists is, no doubt, true, but wholly irrelevant.

---

(1) 10 Q. B. D. 207.

(2) [1911] 1 Ch. 393.

On the second point I have felt considerable doubt. So far as authority to employ a shorthand writer is concerned I agree with the appellants' counsel that, if the cost could be allowed against the National General Company, it ought to be allowed also against both the other two companies, which left the conduct of the defence to the National General Company and their solicitors. But it is not suggested in this case that the solicitors explained to any of the lay clients that the costs of shorthand notes might not be allowed as between party and party. I regret, if I may say so, that the Court of Appeal, as long ago as 1882, in *In re Blyth and Fanshawe* (1) prescribed so severe a rule as to solicitor and client taxation in the matter of shorthand notes, but that decision was expressly approved by Lord Esher M.R. and Baggallay L.J. in the later case of *In re Broad and Broad* (2), and it appears to me to govern this case, and I must loyally decide in accordance with it. I cannot distinguish the material facts. There, as here, the client knew of, and the client's counsel and the arbitrator used, the shorthand notes. There, as here, there was an arbitration. There, as here, expert evidence was called. The only distinction on the facts appears to be that in that case both parties seem to have employed a shorthand writer. I feel bound, and, I must add, reluctantly bound, to say that this fact is not sufficient to justify me in treating this case in a different way. In *Osmond* v. *Mutual Cycle and Manufacturing Supply Co.* (3) the Court of Appeal was able to find that there was an arrangement as to shorthand notes with the sanction of the judge at the trial

(1) 10 Q. B. D. 207.
(2) 15 Q. B. D. 420.
(3) [1899] 2 Q. B. 488.

which made the costs costs to be allowed on taxation between party and party; and also that, the case being a patent case, that is to say, belonging to a class of action in which shorthand notes are with the approval of the Courts treated as a proper expenditure, the expense might be treated, according to the language of the relevant rules as to taxation, as a "usual" and not an "unusual" expense. In the present case the learned arbitrator, so far as he expressed approval, did so not on the special ground of the character of the evidence to be adduced or by reason of a forecast as to the probable length of the proceedings. What he said was: "That"—the shorthand note—"is in most cases very desirable; it shortens the case."

This appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants: *Roney & Co.*

Solicitors for respondents: *Hair & Co.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.
1913
Dec. 12, 15

SUN INSURANCE OFFICE (APPLICANTS) *v.* GALINSKY AND OTHERS (CLAIMANTS).

Practice—Interpleader—Insurance on House against Fire—Insurance in Names of Lessor and Lessee—House destroyed by Fire—Lessor requiring Insurance Company to rebuild—Lessee claiming Payment of Insurance Money—"Adverse claims"—"Debt, money, goods, or chattels"—Fires Prevention (Metropolis) Act, 1774 (14 *Geo.* 3, *c.* 78), *s.* 83—*Rules of the Supreme Court,* 1883, *Order* LVII., *r.* 1 (*a*).

A house was insured against fire in the joint names of the lessor and lessee. During the currency of the policy the house was burnt down, and the lessor served notice on the insurance company under s. 83 of the Fires Prevention (Metropolis) Act, 1774, requesting them to cause the insurance money to be laid out and expended in or towards rebuilding the house. The lessee wrote a letter to the insurance company which the latter contended amounted to a claim that the insurance money should be paid to him. The insurance company took out an originating summons for relief by way of interpleader under Order LVII., r. 1 (*a*):—

Held, that the insurance company were not entitled to relief by way of interpleader.

By Vaughan Williams L.J., upon the ground that the lessee had not made any claim to the insurance money, and that therefore there were not "two or more parties making adverse claims" within Order LVII., r. 1 (*a*).

By Buckley and Kennedy L.JJ., upon the ground that, as the lessor was claiming the performance by the insurance company of their statutory obligation under s. 83 of the Act of 1774 to expend the insurance money in rebuilding the house, and as the lessee was claiming that the insurance company should pay the money to him, there were not two or more parties making "adverse claims" in respect of a liability of the insurance company "for any debt, money, goods, or chattels" within Order LVII., r. 1 (*a*).

APPEAL from an order of Bucknill J. at chambers.

On March 7, 1900, the claimants Robinson and Bott, in whom was vested, as trustees under a will, the fee simple of seven houses, 63 to 75 (odd numbers), Cable Street, London, E., by deed demised the said houses to one Isaac Cohen for a term of twenty-one years from June 24, 1899, and the lease contained a covenant by the lessee to repair the premises and to insure them against fire in the joint names of the lessors and the lessee, and the lease contained the following provision: "And it is hereby agreed that all moneys that may be received in respect of any such insurance as aforesaid shall with all convenient speed be laid out and expended in rebuilding or as the case may require in repairing and reinstating the said demised premises or such part or parts thereof as may be destroyed or damaged by fire, and the deficiency, if any, shall be made good by the lessee, his executors, administrators, and assigns."

The lease was assigned to and became vested in the claimant Marks Galinsky. On November 6, 1908, the seven houses were insured against loss or damage by fire with the Sun Insurance Office in the joint names of Galinsky, as the lessee, Robinson and Bott, as the freeholders, and a Mrs. Johnston (1) in the sum of 2100*l*. This policy was annually renewed. On March 4, 1913, one of the said houses, 69, Cable Street, was destroyed or damaged by fire, and thereupon a sum of 292*l*. became due under the policy in respect thereof. A correspondence ensued between the respective solicitors for the lessors and Galinsky as to laying out the insurance money in rebuilding, but no agreement was arrived at with reference to the employment of a builder to rebuild the house. Galinsky thereupon proceeded to have the house rebuilt under the supervision of his son, who was a builder, and on August 8, 1913, Robinson and Bott served a notice on the Sun Insurance Office under s. 83 of the Fires Prevention (Metropolis) Act, 1774, requesting them to cause the insurance money payable in respect of the said house to be laid out and expended in or towards rebuilding or reinstating such house. On August 20, 1913, the solicitors for Galinsky wrote to the solicitors for the Sun Insurance Office stating: "With reference to your call here yesterday we have now seen our client thereon who says that the work on the property is now well in hand and will be completed very shortly. It is under the supervision of his son, Mr. Harry Galinsky, who has considerable experience of building matters and has a competent staff of men working under him. We suggest as one way out of the difficulty that you arrange with Mr. Harry Galinsky to carry out the work on your behalf. We may add that in this event our client, Mr. M. Galinsky, the assured, will not ask for payment of the 292*l.* till the work is completed."

---

(1) Mrs. Johnston was a mortgagee of the lease of the houses, but she made no independent claim under the policy, and nothing turned upon her name being in the policy.

On August 27, 1913, the Sun Insurance Office took out an originating summons in the King's Bench Division for relief by way of interpleader, entitled (so far as material to this report) "In the matter of an expected action or actions. Between the Sun Insurance Office, applicants, and Marks Galinsky, Tom Robinson and Henry Bott, and Mrs. Johnston, claimants," calling upon the claimants to appear and state the nature and particulars of their respective claims to the subject-matter in dispute, and to maintain or relinquish the same, and abide by such order as might be made.

On October 20, before the summons was heard, the solicitors for Marks Galinsky sent to the solicitors for the Sun Insurance Office a document together with a letter in which they said that the enclosed document "coupled with the fact that he (Galinsky) has outlaid over 200*l.* in rebuilding and that your clients still hold the insurance money amounts to security within the meaning of the Act of 1774." The document enclosed was dated

C. A.
1913

SUN INSURANCE OFFICE v. GALINSKY.

October 17 and was signed by Marks Galinsky and his son, Harry Galinsky, and it stated that the undersigned, Marks Galinsky, in pursuance of s. 83 of the Act of 1774, having already carried out a large part of the rebuilding of the house, thereby undertook that the insurance money to be paid by the Sun Insurance Office under the policy should be laid out and expended towards rebuilding and reinstating the house, and the undersigned, Harry Galinsky, guaranteed the due performance by Marks Galinsky of the undertaking.

Upon the summons coming on before the Master, he referred it to the judge in chambers. On October 30, 1913, Bucknill J., upon the hearing of the summons, made an order "that the applicants do within seven days pay into Court the sum of 292*l.* in the matter of this originating summons to abide further order of the Court and that the costs thereof be reserved. Liberty to apply . . . . This order to be without prejudice to all questions in the matter," and gave leave to the claimants Robinson and Bott to appeal.

Robinson and Bott appealed.

J. Sankey, K.C., and *W. Mackenzie*, for the appellants. This case does not come within Order LVII., r. 1 (*a*), giving relief by way of interpleader. There is not here a liability of the Sun Insurance Office "for any debt, money, goods, or chattels, for or in respect of which" they are, or expect to be, "sued by two or more parties . . . . making adverse claims thereto." After the notice which was served by the appellants on the insurance company under s. 83 of the Fires Prevention (Metropolis) Act, 1774,—which is of general and not merely local application: *Ex parte Gorely* (1); *Sinnott* v. *Bowden* (2)—the company became "authorised and required to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating, or repairing" the house. That was not a claim by the appellants to any sum of money. They were claiming the fulfilment by the insurance company of their statutory duty to reinstate the premises. Galinsky on the other hand, if he was making any claim at all, was claiming payment of the 292*l*. Those are two claims of a totally different nature. They are not "adverse claims" to a "liability for any debt, money, goods, or chattels" within the meaning of the rule. In *Paris* v. *Gilham* (1) Sir William Grant M.R. considered that in such a case a bill of interpleader was a proper bill, but that was under the old procedure of the Court of Chancery. See Mitford's Chancery Pleadings, 5th ed., p. 58. At law the procedure was not so wide. It was governed by 1 & 2 Will. 4, c. 58, and s. 12 and the following sections of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126). Now interpleader proceedings are regulated by Order LVII. Under 1 & 2 Will. 4, c. 58, the adverse claims must have been in respect of one and the same subject-matter, and the interpleader procedure was not applicable where the party seeking interpleader relief might be liable to both claimants: *Farr* v. *Ward*. (2) A bill of interpleader would not have been entertained where there might be two liabilities: *Cochrane* v. *O'Brien* (3); *Crawford* v. *Fisher*. (4) There cannot be interpleader relief under Order LVII., r. 1 (*a*) where the claims are in respect of different liabilities: *Ingham* v. *Walker* (5); *Greatorex* v. *Shackle*. (6) The order, therefore, of the learned judge, which is merely preliminary to an order for an interpleader issue, is wrong. [*Ex parte Mersey Docks and Harbour Board* (7) was also referred to.]

---

(1) (1864) 4 D. J. & S. 477.

(2) [1912] 2 Ch. 414.

E. M. Pollock, K.C., and *G. Wood Hill*, for the Sun Insurance Office. *Paris* v. *Gilham* (1) is a direct authority that interpleader relief will be granted in circumstances such as exist in the present case. The law as there stated is still applicable. The present law under Order LVII. is wider than it was under the procedure in Chancery at the time when that case was decided. The power of the Common Law Courts in this respect under 1 & 2 Will. 4, c. 58, and the Common Law Procedure Act, 1860, was wider than that of the Court of Chancery. The Court would grant relief even though one of the parties had entered into a special obligation, such as a contract of bailment, with one of the claimants: *Best* v. *Hayes* (1); *Tanner* v. *European Bank* (2); Day's Common Law Procedure Acts, 4th ed., pp. 358, 359. Those decisions were approved in the Court of Appeal in *Attenborough* v. *London and St. Katharine's Dock Co.* (3), where it was pointed out that the case of *Crawshay* v. *Thornton* (4) was the case of a bill of interpleader filed under the practice formerly existing in the Court of Chancery, and that s. 12 of the Common Law Procedure Act, 1860, was enacted to prevent the further application of the principle laid down in that case. As Brett L.J. said in that case (at p. 459), the claims need not be co-extensive. The terms of Order LVII. are at least as wide as the provisions of the Acts which the Order supersedes, and they give an absolute discretion to the Court to grant relief by way of interpleader, subject to the existence of the conditions mentioned in the Order. That is specifically recognized in *Ex parte Mersey Docks and Harbour Board.* (5) In that case it was held that the fact that the bailee was estopped by reason of an attornment to one of the claimants from setting up the jus tertii did not prevent him from getting relief by way of interpleader. The present interpleader procedure is therefore wider than that of the old Court of Chancery under which *Paris* v. *Gilham* (6) was decided, and that decision is applicable to the present case. "Adverse claims" in Order LVII., r. 1 (*a*), include inconsistent claims. The claims here—that of the appellants requesting the insurance company to lay out the insurance money in reinstating the premises, and that of Galinsky for payment of the money to him—are "adverse claims" within the meaning of the rule.

---

(1) (1813) Coop. Ch. Cas. 56.
(2) (1837) 2 M. & W. 844.
(3) (1845) 2 Jo. & Lat. 380.
(4) (1842) 1 Hare, 436, at p. 441.
(5) (1887) 3 Times L. R. 448.
(6) [1895] 2 Q. B. 249.
(7) [1899] 1 Q. B. 546.

If interpleader relief is not granted, the position of the insurance company will be extremely difficult. Upon receiving the notice from the appellants they are "required" to apply the insurance money in reinstating the premises. Galinsky claims the money. In *Simpson* v. *Scottish Union Insurance Co.* (7) Page Wood V.-C., speaking of s. 83 of the Act, said (at p. 628)

---

(1) (1863) 1 H. & C. 718.

(2) (1866) L. R. 1 Ex. 261.

(3) (1878) 3 C. P. D. 450.

(4) (1837) 2 My. & Cr. 1.

(5) [1899] 1 Q. B. 546.

(6) Coop. Ch. Cas. 56.

(7) (1863) 1 H. & M. 618.

C. A.
1913

SUN INSURANCE OFFICE *v.* GALINSKY.

that "the company themselves are the persons to rebuild." That is their duty. In *Wimbledon Park Golf Club* v. *Imperial Insurance Co.* (1) Wright J. held that a mandamus could not be granted to compel the insurance company to execute the work of rebuilding, because that would involve the entry of the company by their workmen upon the land and might be a trespass, and the Court would not grant a mandamus to commit a trespass. If that decision is correct, it places the insurance company in a difficult position when called upon to perform their statutory duty, and the judgment of Wright J. prevents the company from reinstating.

R. J. Drake and *A. Crew*, for Galinsky.

No reply was called for.

Vaughan Williams L.J. I understand that this case is regarded as of great importance to fire insurance companies. They say that they are placed in a difficulty in cases where there is a fire insurance which is governed by s. 83 of 14 Geo. 3, c. 78, and their contention is that, as the rival claimants are before the Court, the question as to what ought to be done with the insurance money can conveniently be raised on an interpleader issue, and that the case comes within the terms of Order lvii. of the Rules of the Supreme Court, 1883.

I do not think that any one will deny that the old procedure under 1 & 2 Will. 4, c. 58, and the Common Law Procedure Act, 1860, and the present procedure under Order lvii. of the Rules of the Supreme Court have been most beneficial in cases where there are disputes between rival claimants. I am therefore extremely unwilling to place any limitations upon Order lvii. which do not appear upon the face of the Order itself. In these circumstances I do not decide that the circumstances of this case could not raise a question proper to be disposed of under an interpleader order. I think myself that, if Order lvii. is subject to such a limitation as is suggested, it would be a misfortune; it would, in my opinion, be an unnecessary limitation; and it would, I am inclined to think, be a departure from the principles on which interpleader orders have been made. I do not wish, in a case in which it is unnecessary to do so, to lay down a new rule which affirmatively and in terms will limit Order LVII. I do not think it is necessary in this case because, in my opinion, the learned judge in chambers, or whoever has to dispose of these questions of interpleader, has always, in a case which comes within the Order, a discretion in the matter. One of the cases in which a discretion would properly be exercised by refusing to make an interpleader order would be where he came to the conclusion that neither of the suggested claimants had any claim whatever. The same would be true if one of the parties had no sort of claim. The claim put forward might be an absurd one.

---

(1) (1902) 18 Times L. R. 815.

In the first place, Galinsky has never made any claim at all. He has acted in a way which is wholly inconsistent with the provisions of s. 83 of 14 Geo. 3, c. 78. In these circumstances there are not two claimants. There is only one claimant. In the next place, not only has Galinsky made no claim, but he has proceeded on the footing that he has no claim. In his solicitors' letter to the insurance company Galinsky did not affect to claim as of right; he simply tried to persuade the insurance company to do a certain thing for him if they could see their way to do it.

I do not think that s. 83 of 14 Geo. 3, c. 78, is difficult to construe. It provides that "it shall and may be lawful to and for the respective governors or directors of the several insurance offices for insuring houses or other buildings against loss by fire"—it is necessary to bear in mind that the principal object of this enactment is to prevent frauds being effected through insurances against fire—"and they are hereby authorised and required, upon the request of any person or persons interested in or intitled unto any house or houses or other buildings which may hereafter be burnt down, demolished, or damaged by fire, or upon any grounds of suspicion that the owner or owners, occupier or occupiers, or other person or persons who shall have insured such house or houses or other buildings have been guilty of fraud, or of wilfully setting their house or houses or other buildings on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating, or repairing such house or houses or other buildings so burnt down, demolished, or damaged by fire, unless"—there are two alternatives—"the party or parties claiming such insurance money shall, within sixty days next after his, her, or their claim is adjusted, give a sufficient security to the governors or directors of the insurance office where such house or houses or other buildings are insured that the same insurance money shall be laid out and expended as aforesaid, or unless the said insurance money shall be in that time settled and disposed of to and amongst all the contending parties, to the satisfaction and approbation of such governors or directors of such insurance office respectively." Those are the two alternatives and neither event has happened. The insurance company therefore had their statutory duty to perform, and nothing has occurred to affect or alter that duty in the slightest degree. In these circumstances, inasmuch as the judge at chambers had a discretion as to whether the interpleader order ought to be made, even in a case which falls within Order LVII., it seems to me that the proper course was for the learned judge to say that there were not two claimants here for payment at all. One of the supposed claimants has done something which he clearly ought not to have done; he has interposed and apparently sought to defeat the statute. To my mind the interpleader order ought not to have been made.

A question has been raised as to whether s. 83 of the Act can bear the construction that the insurance company have a duty to perform which would enable them to enter upon the premises and perform that duty. In the case of *Wimbledon Park Golf Club* v. *Imperial Insurance Co.* (1) Wright J. expressed the opinion that there was no power which enabled the insurance company to enter upon the land for the purpose of rebuilding—in other words, that there could not be an order on the insurance company to do something which involved a trespass. I give no decision upon that question. The effect, I take it, of Bucknill J.'s order is that, the applicants being prepared to bring the 292*l.* into Court and having done so, an interpleader order, if applied for, will be granted. I only decide that this is not a case in which an interpleader order ought to be

(1) 18 Times L. R. 815.

C. A.
1913

SUN INSURANCE OFFICE *v.* GALINSKY.

made, inasmuch as there are not two claimants. In my opinion the appeal succeeds.

Buckley L.J. On November 6, 1908, the appellants, Robinson and Bott, were the lessors and Galinsky was the assignee of a lease of certain houses numbered 63 to 75, odd numbers, in Cable Street, in the east of London. On that date those parties and a Mrs. Johnston, who was mortgagee, effected an insurance against fire in respect of those seven houses with the Sun Insurance Office. On March 4, 1913, a fire occurred at 69, Cable Street. On August 8, 1913, the appellants, the lessors, served upon the insurance office a notice under s. 83 of 14 Geo. 3, c. 78, and the result of that notice was that the insurance office became "authorised and required to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating, or repairing" the house. There is no dispute between the parties as to the amount of the insurance money. It has been adjusted between them. The amount is 292*l.* Notwithstanding the notice by the lessors, Galinsky, by his son, has done certain work upon the premises by way of repair, and he desires that the insurance money should be paid to him. The appellants say that the duty of the insurance office, having regard to the notice under the Act, is to cause the money to be laid out in reinstatement, and not to pay it to the assured. In this state of facts the insurance office on August 27, 1913, issued an originating summons for relief by way of interpleader under Order LVII., r. 1 (*a*), naming themselves as applicants, and Galinsky, Robinson and Bott, and Mrs. Johnston as claimants.

The question, and in my opinion the only question, for determination is whether the insurance office can claim relief by way of interpleader under Order LVII., r. 1 (*a*). From the facts which I have stated it is apparent that the position of matters is this. The persons who are contesting this matter are Robinson and Bott on the one hand, and Galinsky on the other. They are persons to whom with another, who may be left out of consideration, the Sun Insurance Office owe a certain obligation. It is not that they owe the obligation to one of them to the exclusion of the other, or that they owe a larger obligation to one and a lesser obligation to the other. They owe one obligation, whatever that obligation may be. The parties are not disputing as to which of them is entitled to the performance of the obligation. They are disputing as to what is the obligation which is due to them. One of them says that the obligation is to repair and reinstate the premises; the other says it is to pay money. In that state of facts the interpleader summons is issued. If an interpleader order were made, the result would be, or might be, that the question which of those two views of the obligation was right would be determined in the absence of the Sun Insurance Office, the persons who owed the obligation. In that respect this case differs from *Paris* v. *Gilham*. (1) That was the case of an interpleader bill under the old practice in Chancery, and the plaintiff in the action was the insurance office and the defendants were the two claimants. In the present case, if an interpleader issue were ordered, the result would be that the Sun Insurance Office would stand by, leaving the two claimants to work out, in the absence of the insurance office, what the nature of the obligation is.

It is sought to bring the case within these words of Order LVII., r. 1: "(*a*) Where the person seeking relief (in this Order called the applicant)"—that is to say, in this case the Sun Insurance Office —"is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or more parties (in this Order called the claimants) making adverse claims thereto." In the first place I will make the hypothesis, though I think it is an erroneous one, that the obligation of the Sun Office is a liability within the words "liability for any debt, money, goods, or chattels." Assuming that is so, still I have to see whether two or more parties are "making adverse claims thereto." To my mind these two parties are doing nothing of the kind. They are making inconsistent claims as to the nature of the obligation and as to the application of the proceeds thereof. The question between them is, what are the applicants bound to do? Are they bound to do work of repair or are they bound to pay money? That is not in any way, as it appears to me, within the words of the rule.

---

(1) Coop. Ch. Cas. 56.

C. A.
1913

SUN INSURANCE OFFICE v. GALINSKY.

Buckley L.J.

Secondly, I will examine the hypothesis I have made, and inquire whether the obligation of the Sun Insurance Office is for any "debt, money, goods, or chattels." In my opinion it is not. The dispute is whether there is a debt due by the Sun Insurance Office or an obligation on their part to expend money in rebuilding the premises. There is no ground for interpleader as regards any "debt." Nor are there adverse claims to "money" or "goods or chattels." Supposing it were possible to direct an issue in this case, what would its form be? Not whether Robinson and Bott are or Galinsky is entitled to the benefit of the obligation, but what is the obligation of the Sun Office? Is it their duty to lay out the money in rebuilding or to pay over the money? That is not the subject of interpleader. It seems to me, therefore, that this is wholly outside the interpleader order.

But even assuming that interpleader were possible, it seems to me that the order of the learned judge is wrong. The order is that the Sun Insurance Office do pay into Court the 292*l.* to abide further order of the Court with liberty to apply. The Sun Insurance Office, upon being served with the notice to reinstate, became bound to do that which s. 83 of 14 Geo. 3, c. 78, has directed, namely, to cause the money to be applied in reinstatement. The learned judge, by ordering the 292*l.* to be paid into Court, has ordered the Sun Insurance Office to denude themselves of the means of complying with the obligation imposed by the Act. The intention of the order must have been that the Sun Insurance Office, having paid the money into Court, should be discharged from seeing to the proper application of the money. That cannot be right. It is the duty of the insurance office to see that the money is laid out in a certain manner. The order must therefore be wrong.

There is one other matter which has been discussed, and I only refer to it for the purpose of saying that I do not intend to express any opinion upon it. The decision of Wright J. in *Wimbledon Park Golf Club* v. *Imperial Insurance Co.* (1) has been cited. The point of the learned judge's decision which has been referred to is that the insurance office could not carry out the work of reinstatement without entering upon the lessee's land, and the learned judge said in effect that he could not grant a mandamus to a person to do something which that person might not be able to do without committing a trespass. It is quite unnecessary in this case to determine whether or not that decision is right. It is, to my mind, a very serious question whether, where an insurance in the common form has been effected in the joint names of lessor and lessee, the lessor can by giving notice under s. 83 of 14 Geo. 3, c. 78, enable the insurance company to enter upon the premises of his lessee—a lessee possibly for a long term of years—and there execute such works as the insurance company may think right and proper. When that question comes up for consideration, I think it will have to be closely considered. It does not arise in the present case, and I determine nothing about it.

---

(1) 18 Times L. R. 815.

It results therefore that the interpleader summons was wrongly issued. The right order would have been to dismiss the summons. That, in my opinion, is the order which we ought to make.

Kennedy L.J. I am of the same opinion. The order under appeal was made upon the hearing of a summons for relief by way of interpleader, which was served upon Galinsky, Robinson and Bott, and a Mrs. Johnston, described as the claimants. To my mind that summons was a mistaken one in its origin. There was no claim by Robinson and Bott for the payment of any sum of money at all. They had, under s. 83 of 14 Geo. 3, c. 78, as being "persons interested in or intitled unto any house or houses," made the request to the insurance company therein mentioned, and upon that request, as it appears to me upon the true construction of the Act, the insurance company were bound, not to pay money to them, but to cause the insurance money to be laid out and expended, as far as the same would go, towards rebuilding, reinstating, or repairing the premises. Only that which is described in Order lvii., r. 1 (*a*), when claimed by two or more persons making adverse claims thereto, can be the subject of interpleader proceedings. From the first I felt great difficulty in understanding, however liberally one would seek to employ the machinery of interpleader, which is intended to prevent a person in the position of a stakeholder, or in a position analogous to that of a stakeholder, from being harassed by two persons making claims upon him, how the interpleader procedure can be applied to this case. I have only to see if the case comes within the words of the rule which describes a case for interpleader, because interpleader proceedings are governed now solely by the rules. Order LVII., r. 1, provides that "relief by way of interpleader may be granted (*a*) where the person seeking relief . . . . is under liability for any debt, money, goods, or chattels, for or in respect of which he is, or expects to be, sued by two or more parties . . . . making adverse claims thereto." The appellants, Robinson and Bott, require the insurance company to reinstate the premises. The limit of the liability under the policy may be 292*l.*, but the claim is as I have described it. Galinsky is the other party. I agree with what my Lord has said, that there is the greatest difficulty in seeing that he has made any claim in the proper sense of the term, that is to say, that the Sun Insurance Office could say that he was a person who had made a claim in respect of which they expected to be sued. I have a strong impression that Galinsky appreciates his position and that he knows that, unless he can get, as my Lord has said, something like a favour granted to him, he has no legal position in the matter after the notice which the appellants served on the insurance company under s. 83 of the Act. But I will assume that he has said that as a party to the policy he requires to be paid the 292*l.* in respect of work which has been done under the superintendence of his son, and that he is going to sue the insurance company for the money. I will assume that. Still there is nothing in respect of which interpleader proceedings can be taken under Order LVII., r. 1 (*a*). One party says that he insists upon the performance by the insurance company of their statutory duty to reinstate the premises, a claim which will not be satisfied by the payment of a sum of money. The other party says that he claims to be paid the 292*l.* Those are the two claims. A long series of cases have been cited to shew that a liberal construction ought to be placed on the enactments relating to interpleader. I agree that that ought to be so. But, as Collins L.J. pointed out in *Ex parte Mersey Docks* *and Harbour Board* (1), the absolute discretion given to the Court must be "subject to the existence of the conditions mentioned in the order." Inasmuch as those conditions are not present the suggested liberality of construction appears to me to furnish no basis on which the present application can stand. In many cases the question raised was whether a party could avail himself of the interpleader procedure where he was under a special contractual obligation, such as bailment, to one of the two parties claiming the goods. It was at one time thought that in the case of a bailment the bailee was estopped from protecting himself by interpleader proceedings, because the bailor would have a right to say that, whatever the claims of other persons might be, as between them there was the special contract of bailment, and the bailee could not be allowed to escape from the action brought against him upon that contract. That is no longer the law. To that extent modern law may be more liberal than the old law, but it can have no application to a case like this where the primary conditions of Order LVII., r. 1 (*a*), are absent.

In these circumstances it seems to me that the learned judge ought to have dismissed the summons. What he did, no doubt with the intention of shortening the case, was, not to make an interpleader order, but to order 292*l*., which was the limit of the liability of the insurance company, to be paid into Court. The result of that would be, if it were followed by an interpleader order, that the insurance company would cease to be a party to the interpleader proceedings, and the party who was insisting upon his right to call upon the insurance company to reinstate the buildings would find that he had no one against whom he could enforce that right. However successfully he might vindicate that claim as against Galinsky, the persons against whom he could assert his right would be released.

I desire to say a few words with regard to the case of *Wimbledon Park Golf Club* v. *Imperial Insurance Co.* (2) Wright J. is reported to have said in that case that a mandamus could not be granted to direct the insurance company to perform their obligation, because the company had no power to enter upon the land for the purpose of rebuilding. In other words, that it might be a trespass, and that the Act, though its language is very strong, did not empower the company to enter upon the land by their workmen. If ever that question comes up for consideration, I think that it will be well worth considering whether the judgment of the learned judge upon this point is correctly reported. I cannot help feeling some doubt about that, because he makes special reference to the particular circumstances of that case which might make the grant of a mandamus impossible. While I quite agree that, according to the report, he does not solely base his decision on the special circumstances, I cannot help thinking that the special circumstances may have influenced his mind in that case. But, be this as it may, it will have to be considered, when, if ever, it comes up for consideration, together with the, to my mind, irreconcilable decision of Page Wood V.-C. in *Simpson* v. *Scottish Union Insurance Co.* (1), where the learned Vice-Chancellor said: "The Act of Parliament points to a request of this kind in order that the company may cause the money to be laid out in rebuilding, and I think it clear that they could not pay the money to the owner. The object of the provision is, in the interest of the public, to prevent persons from fraudulently setting fire to their houses, and this is a fraud which of course might be committed either by the owner or the tenant." Then follow words which will have to be specially borne in mind if the judgment of Wright J. comes up for consideration: "The company themselves are the persons to rebuild, in order that they may see that the money is really laid out in reinstating the property, and that it is judiciously expended. It is quite true in this case that the value of the house is stated to have been in excess of the insurance; but that does not affect the policy of the Act, which does not in any case give the owner the right to rebuild and claim the money, but requires the work to be done by the company." If that is correct, and the Legislature has required the company themselves to rebuild, the question will require consideration whether either the landlord or the lessee can prevent an order being made by the Court to enable the company to perform their statutory duty. It is not necessary, however, to decide that question in the present case, but as stress was laid upon it in argument it seems to me to be necessary to say that, in my judgment, the decision of Wright J. as reported upon this point may have to be carefully considered. I decide this case upon the ground that the necessary conditions for the application of the interpleader procedure do not exist, even taking the case as favourably to the Sun Insurance Office as possible by assuming that Galinsky has made a claim to this money. Therefore no order for interpleader ought to have been made, and the order which has been made, though it does not direct an interpleader issue, can only be justified as a preliminary step to the grant of an interpleader issue.

---

(1) [1899] 1 Q. B. 546, at p. 554.

(2) 18 Times L. R. 815.

---

(1) 1 H. & M. 618, at pp. 628, 629.

The appeal therefore succeeds.

Appeal allowed.

Solicitors for Sun Insurance Office: *Dawes & Sons.*
Solicitors for lessors: *Beamish, Hanson, Airy & Feiling.*
Solicitors for tenant: *Armitage & Armitage.*

W. F. B.

1914
March 4, 5.

MAYOR, ALDERMEN, AND BURGESSES OF STRATFORD-UPON-AVON *v.* PARKER.

Landlord and Tenant—Lease—Repairing Covenant—Death of Assignee intestate—Executor de son tort—Personal Liability on Repairing Covenant.

The assignee of a lease granted by the plaintiffs died intestate, leaving no estate other than the lease. The defendant, her son, who had collected the rents of the demised premises on his mother's behalf during her lifetime, continued to collect them after her death, and, after paying the ground rent in her name to the plaintiffs, he handed the balance to his sister. After his sister's death the defendant still continued to collect the rents and to pay the ground rent in his mother's name to the plaintiffs, retaining the surplus for such person or persons as might in law be found entitled thereto. Shortly after the defendant's sister's death the plaintiffs became aware for the first time of the death of the defendant's mother, the assignee of the lease, and after some correspondence with the defendant they entered into possession of the premises and sought to make him personally liable for breach of the repairing covenant contained in the lease on the ground that he had intermeddled with the lease and had become an executor de son tort:—

Held, that the defendant was not liable by privity of estate as the lease was never vested in him, and he had not so acted as to make himself liable by estoppel.

The decision in *Williams* v. *Heales* (1874) L. R. 9 C. P. 177 was founded upon estoppel.

Appeal from the Stratford-upon-Avon County Court.

The plaintiffs sued the defendant for breach of covenant to repair contained in a lease granted by them to one Parker in 1814, of which lease the defendant's mother was assignee at the date of her death.

The defendant's mother died in 1910 intestate, leaving no estate other than the lease. In his mother's lifetime the defendant collected the rents of the demised premises on her behalf; and after her death he continued to collect the rents, and after paying the ground rent to the plaintiffs, he paid the balance to his sister until her death on August 8, 1912. Thereafter he continued for some time to collect the rents, paying the ground rent in his mother's name to the plaintiffs, and retaining the surplus on behalf of such person or persons as might in law be found entitled thereto. In December, 1912, the plaintiffs wrote a letter addressed to the defendant's mother, they not being then aware of her death, requesting certain work specified by them to be carried out on the demised premises in accordance with the covenant in the lease. The defendant's solicitor replied on December 20, 1912, informing the plaintiffs of the defendant's mother's death and stating that the defendant did not admit any liability for dilapidations. On February 6, 1913, the plaintiffs wrote to the effect that if the defendant was not his mother's executor he had intermeddled with the assets and had thus rendered himself liable for at least the amount he had received, and asking for an authority to all the tenants of the premises in question to pay the rents in future to them so that they might be certain of some compensation for the bad state into which, as they alleged, the premises had been allowed to fall. In answer to that letter the defendant's solicitor stated that the defendant's mother died intestate, that no letters of administration had been taken out, and that while the defendant could give no legal authorization for the tenants to pay the rents to the plaintiffs he had no objection to the plaintiffs taking possession. The plaintiffs thereupon entered into possession and sued the defendant as executor de son tort and assignee of his mother, claiming damages for breach of the repairing covenant in the lease.

At the hearing the plaintiffs put in certain answers to interrogatories by the defendant in which, after stating the facts above mentioned as to the receipt of the rents by him, he said that he had never been in possession of the property.

The county court judge found as a fact that the defendant in collecting the rents, &c., acted as agent for his mother and then for his sister, and since the latter's death the plaintiffs had not proved that the defendant had ever taken possession of the term as his own or intended to act for himself. He accordingly dismissed the action.

The plaintiffs appealed.

J. B. Matthews, K.C., *W. H. Riley-Pearson*, and *G. F. Spear*, for the plaintiffs. The defendant having intermeddled with the assets he became an executor de son tort, and having entered upon the term he is liable personally on the covenants: *Williams*

v. *Heales.* (1) As regards an executor's liability there is a distinction between an action for debt for rent and an action on a covenant for not repairing. In the former case an executor can limit his liability; in the latter case he cannot: see *Tremeere* v. *Morrison* (2); *Sleap* v. *Newman* (3); *Rendall* v. *Andreæ.* (4) It is not contended that the defendant in this case is liable by estoppel. [*Padget* v. *Priest* (5) was also referred to.]

Disturnal, K.C., and *John Wylie,* for the defendant. In this case the defendant's mother left no assets except the term, and of that the plaintiffs have taken possession. The defendant is therefore not liable as executor de son tort. It is said, however, on behalf of the plaintiffs that the defendant is personally liable as assignee. That contention is not well founded. The defendant was not the assignee of the term; it never became vested in him. An executor de son tort is in this respect in a different position from a duly appointed executor. The case of *Williams* v. *Heales* (1) was founded upon estoppel, the defendant being held estopped from denying that he was assignee of the term. In this case there is admittedly nothing to estop the defendant from denying that he became assignee. [They also referred to *Hill* v. *Curtis.* (6)]

G. F. Spear in reply. A duly appointed executor who enters into possession of a term belonging to his testator's estate makes himself liable as assignee. The lease becomes vested in him for all purposes. In this case the defendant was an executor de son tort, and having entered he is exactly in the same position as a duly appointed executor. "When a man has so acted, as to become in law an executor de son tort, he thereby renders himself liable, not only to an action by the rightful executor or administrator, but also to be sued as executor by a creditor of the deceased, or by a legatee: for an executor de son tort has all the liabilities, though none of the privileges, that belong to the character of executor": Williams on Executors, 10th ed., vol. i., p. 190.

LUSH J. This is an appeal by the plaintiffs from a judgment of the county court judge of Stratford-on-Avon, and it raises a

(1) L. R. 9 C. P. 177.
(2) (1834) 4 M. & Sc. 603.
(3) (1862) 12 C. B. (N.S.) 116.
(4) (1892) 61 L. J. (Q.B.) 630.
(5) (1787) 2 T. R. 97.
(6) (1865) L. R. 1 Eq. 90.

point of some novelty and some little difficulty. The plaintiffs were the lessors of premises and the defendant's mother was the assignee of the lease. She died a few years ago, and this action is brought against her son as her executor de son tort and assignee, upon a covenant to repair contained in the lease. At the trial the evidence consisted of answers to interrogatories which had been administered to the defendant, and certain correspondence. From the answers to interrogatories it appears that the defendant's mother left no will, and that no letters of administration were granted in respect of her estate. The rents of the demised premises had been collected by the defendant in his mother's lifetime on her behalf and he continued to collect them after her death, paying the same to his sister till her death in August, 1912. Not knowing to whom the property belonged after his sister's death, the defendant continued to collect the rents, and, after paying the ground rent to the plaintiffs, he retained the surplus in his own hands on behalf of such person or persons as might in law be found entitled thereto. It further appears from the fourth answer to interrogatories, which was put in as part of the plaintiffs' case, that the defendant was never in possession of the demised premises.

From the correspondence it appears that the defendant paid the ground rent after his mother's death in her name and on her behalf to the plaintiffs. It also appears that the plaintiffs were not aware of the mother's death until they received the defendant's solicitor's letter of December 20, 1912, written in answer to the plaintiffs' letter of December 19, 1912, which they addressed to the mother, thinking she was still alive, giving her notice that certain work had to be done by her in accordance with the covenants in the lease and asking to be informed who would do the work and when it would be commenced. In answer to that the defendant's solicitor wrote the letter I have referred to informing the plaintiffs that the defendant's mother had died two years previously without leaving any estate, and that while the defendant had been collecting the rents since her death they had been paid over to the sister. The plaintiffs then wrote to the defendant's solicitor on February 6, 1913, asking if the defendant was his mother's executor, and, if not, who her legal representatives were, and stating that her estate was liable and that if the defendant was not one of the executors he had intermeddled and had thus rendered himself liable for at least the amount he had received. That letter continued thus: "Please send me an authority to all the tenants to pay the rents in future to us, so that we may be certain of some compensation for the very bad state the houses have been allowed to fall into." On February 27, 1913, the defendant's solicitor replied as follows: "He [the defendant] tells me that as there was no estate, his mother left no will, neither has he taken out letters of administration, and for this reason I do not see that he could give you any legal authority for the tenants to pay the rents to you. At the same time so far as he is concerned he has no objection to your taking possession of the houses, and if it will assist you you could use this letter for that purpose." Within a few days of the receipt of that letter the plaintiffs acted upon the suggestion contained in it and took possession of the premises, and from that time they have received the rents.

On these facts the question is whether this action for breach of covenant to repair contained in the lease lies against the defendant, sued, as I have said, as executor de son tort and assignee of the term. The county court judge held that the action would not lie and he gave judgment for the defendant. In his notes the county court judge says that he finds as a fact that the defendant acted as agent first for his mother and then for his sister, and since the latter's death the plaintiffs (having regard to the facts stated in the defendant's answers to interrogatories which they had put in) had not proved that the defendant had ever taken possession of the term as his own or acted or intended to act for himself.

It is obvious that the defendant, who was no party to the lease, cannot be sued on the covenant unless he became liable as assignee by privity of estate or by estoppel. It will be convenient to deal with the latter alternative first. It is perfectly plain from the correspondence that he never paid the ground rent in his own name, and that he did nothing in the nature of attorning to the plaintiffs as their tenant or assert expressly or impliedly to them that he was. The plaintiffs never received any ground rent from the defendant on the footing that he was their tenant; on the contrary, they took the ground rent on the footing that it came from the mother, and as soon as they ascertained that it did not come from her and that she was dead, they acted upon the suggestion made by the defendant and took possession at once. The plaintiffs never having altered their position and the defendant never having acted upon the footing that he was their tenant, there can be no estoppel. The next question is: Is an executor de son tort, who does that which the present defendant did, liable by privity of estate on the covenants? When one considers what the true position of an executor de son tort is, it seems clear that he is not liable. An executor, that is one duly appointed, is, of course, in an entirely different position. If the testator dies possessed of a term of years, the term vests in the executor by operation of law, but he cannot be sued personally on the covenants contained therein; if he enters and takes possession and enjoys the beneficial occupation of the term, the entry, coupled with the legal title as executor, places him in the position of an actual assignee of the term and renders him liable on the covenants by privity of estate just as fully as if the term had been assigned to him inter vivos by the original lessee. But an executor de son tort has no title to the term. If he intermeddles he becomes subject to the liabilities that an ordinary executor is subject to in respect of the assets with which he has intermeddled, but he has none of the privileges or benefits of the ordinary executor and does not by operation of law or otherwise become entitled to the term of years which has never been assigned to him. The present defendant was therefore never possessed of the term, and therefore never had that privity of estate which would impose upon him the same liabilities in respect of the covenants as if he had actually entered into them. The case of *Williams* v. *Heales* (1) which was cited to us as an authority in favour of the plaintiffs is, when properly considered, an authority in the defendant's favour. There the defendant undoubtedly intermeddled with an asset, namely, a term of years; he received rents, paid ground rent in his own name to the plaintiffs, the lessors, and continued to do so for many years. The question was whether the plaintiffs were entitled to treat him as in the position of covenantor on the covenant to repair. If the proposition had been the simple one it was said by the present plaintiffs to be, there would have been no difficulty in dealing with the case. The defendant in *Williams* v. *Heales* (1) was held by the majority of the Court to be an executor de son tort,—although the head-note to the report merely states this as a semble—he had entered and taken possession, and therefore, according to the present plaintiffs' contention, he could have had no defence to the action, but the Court put his liability on the ground of estoppel. The real basis of the decision was that the defendant had as between himself and the lessor so conducted himself, by paying rent and otherwise asserting a title to the term, that he was estopped from disputing that he was in the position of assignee—a ground wholly unnecessary if the present plaintiffs' argument is right, and one without any foundation in the present case. Therefore the case of *Williams* v. *Heales* (1) goes a long way to support the present defendant's contention.

---

(1) L. R. 9 C. P. 177.

For the reasons I have given, I am of opinion that the appeal fails.

Atkin J. This action was brought upon double or alternative grounds. It was first said that the defendant was liable on the covenants in the lease as executor de son tort of his mother who was for a number of years the assignee of the term. In respect of that he would not be personally liable, but his liability would be confined to such of the mother's assets as came to his hands. The other claim was against the defendant personally. The first claim depends upon two things, first, that the defendant was executor de son tort, and, secondly, that he had assets. I say nothing further about that branch of the claim except that, for no doubt good reasons, it is not the part of the claim that was insisted upon by the plaintiffs. With regard to the second part of the claim, it is said that the defendant is liable because, being an executor de son tort, he entered into possession of the term and therefore became personally liable upon the repairing covenant. So far as an ordinary executor is concerned I think it is plain that he is liable for breaches of covenant committed

(1) L. R. 9 C. P. 177.

after the death of the testator provided he has entered. Although he is assignee of the term by operation of law, he is not personally liable on the covenants unless in addition he has entered. What renders him liable is not entry alone, but that fact coupled with the other that he is in law assignee of the term. The case of an executor de son tort is said by the plaintiffs to be exactly the same—that as executor de son tort he must be deemed an executor, and if he enters he becomes personally liable. That is a fallacy, because in the case of an executor de son tort the term is not vested in him; he is not an assignee in law, and all that has happened is that he has intermeddled with an asset of the estate, namely, the term. That may make him an executor de son tort, but does not vest the term in him and does not create any liability by reason of privity of estate. Therefore an essential feature to establish the liability of an executor is absent in the case of an executor de son tort. In this case there was evidence of a sufficient entry by the defendant which would have made him personally liable on the covenants if he had been in fact appointed an executor; but, inasmuch as he was not an executor, the actual possession by him of, and the dealing with, the rents did not of themselves make him personally liable. An executor de son tort, or indeed any stranger, may of course make himself personally liable by estoppel as against the landlord, and if such acts are done by an executor de son tort as would create an estoppel as between him and the landlord, there can be no question but that he may be made personally liable on the covenants. In this case there is no such estoppel, and in fact liability on this ground was expressly repudiated by counsel for the plaintiffs. In these circumstances there is no ground for saying that the defendant is personally liable on the repairing covenant, and for these reasons I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Crowders, Vizard, Oldham & Co., for Robert Lunn, Stratford-upon-Avon.*

Solicitors for defendant: *Ward, Bowie & Co., for C. E. Whitehouse, Birmingham.*

J. S. H.

1914
March 9, 23.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* BARRON.

Criminal Law—Plea—Autrefois Acquit—Peril of Conviction on Previous Charge—Two Offences substantially the same.

To establish a plea of autrefois acquit it must be shewn either that the defendant had been previously acquitted of the same offence, or could have been convicted at the previous trial of the offence with which he is subsequently charged, or that the two offences are substantially the same.

Reg. v. *King* [1897] 1 Q. B. 214 explained and distinguished.

Appeal from a conviction upon an indictment for committing an act of gross indecency with another male person.

At the assizes at Winchester in November, 1913, the appellant was indicted for the offence of sodomy and was also indicted for the offence of committing an act of gross indecency with another male person. He was tried upon the indictment for sodomy and was convicted; he was not tried upon the other indictment, which remained upon the file. An appeal to the Court of Criminal Appeal was allowed and the conviction quashed, and a judgment and verdict of acquittal was entered in accordance with the provisions of s. 4, sub-s. 2, of the Criminal Appeal Act, 1907; and it was ordered that the appellant should remain in custody to take his trial at the next assizes upon the other indictment.

At the assizes in February, 1914, the appellant was arraigned upon the indictment for committing an act of gross indecency with another male person, and he pleaded autrefois acquit. The facts to be proved and the evidence to be adduced in support of this indictment were admittedly the same as at the previous trial upon the indictment for sodomy, only one set of depositions having been taken in respect of both charges. Ridley J. overruled the plea of autrefois acquit upon the ground that the order of the Court of Criminal Appeal precluded that plea and also that the plea was bad in law, and directed the jury to find a verdict for the Crown on that plea. The appellant thereupon

1914

Rex
v.
Barron.

pleaded guilty and was sentenced to eighteen months' hard labour.

W. Blake Odgers, for the appellant. It must be admitted that at the trial upon the first indictment the appellant could not have been convicted of the offence charged in the second indictment, and that therefore he was not in peril of being convicted of the latter offence. The true test whether a plea of autrefois acquit is good is not, however, whether the person charged was in peril of being convicted on a previous trial of the offence subsequently charged. If the second charge is based upon the same facts and evidence as were proved and adduced in support of the first charge, then the plea of autrefois acquit is good. In *Reg.* v. *Ollis* (1) Darling J. stated the rule to be: "Nemo debet bis puniri pro uno delicto . . . . This rule is the foundation of the pleas in bar known as autrefois acquit and autrefois convict." That means that a man is not to be punished twice for the same wrongful act; and the test whether the wrongful act is the same is whether the facts and the evidence are the same. Sect. 33 of the Interpretation Act, 1889 (2), provides that where "an act or omission" constitutes an offence under two or more statutes, or under a statute and at common law, the offender may be prosecuted under any of the statutes or at common law, but "shall not be liable to be punished twice for the same offence." The case of *Rex* v. *Clark* (3) shews that a person cannot be tried twice for different offences arising out of the same facts. In considering whether a plea of autrefois acquit is good or not, regard must not be had merely to the form of the charge; if the facts are the same the plea is good though the offences charged may be different: *Wemyss* v. *Hopkins* (4); *Reg.* v. *Miles* (5); *Reg.* v. *King.* (6) In *Reg.* v. *King* (6) Hawkins J. said: "It is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts"; and in *Reg.* v. *Miles* (5) the same learned judge said that a conviction or acquittal is final "as to the matter so adjudicated upon."

---

(1) [1900] 2 Q. B. 758, 779.

(2) 52 & 53 Vict. c. 63.

(3) (1820) 1 Brod. & B. 473.

(4) (1875) L. R. 10 Q. B. 378.

(5) (1890) 24 Q. B. D. 423, 431.

(6) [1897] 1 Q. B. 214, 218.

[LUSH J. referred to *Reg.* v. *Drury.* (1)]

In *Rex* v. *Norton* (2) the plea of autrefois acquit was held to be bad because the two charges were based upon different facts. In the present case the evidence to be adduced upon the second charge was the same as that which was given at the first trial, and therefore this case is within the decision in *Reg.* v. *King.* (3)

H. du Parcq, for the Crown. The only test whether a plea of autrefois acquit is good is whether the accused was in jeopardy of being convicted at the first trial of the offence with which he is subsequently charged. If the offences charged are not the same, or if the accused could not have been convicted on the first indictment of the offence for which he is subsequently prosecuted, the plea of autrefois acquit must fail: *Reg.* v. *De Salvi* (4); *Reg.* v. *Gilmore.* (5) In *Reg.* v. *Miles* (6) the case of *Reg.* v. *King* (3) was relied on in support of the plea of autrefois acquit, but the Court of Criminal Appeal held that a prisoner who had been acquitted of larceny could be tried and convicted on the same facts upon a charge under the Prevention of Crimes Act, 1871. In cases where the facts are the same and it appears right in the circumstances to do so, the judge can and often does intimate that the prosecution upon a second charge ought not to be proceeded with; and that is really the meaning of the decision in *Reg.* v. *King.* (3) There are many reported cases in which, the facts and evidence being the same, but the offence charged being different, a man has been prosecuted a second time: 1 Hale, P. C. 246; *Reg.* v. *Brettel* (7); *Reg.* v. *O'Brien.* (8) It was held in *Holcroft's Case* (9) and *Reg.* v. *Tancock* (10) that a person who had been acquitted of murder could not afterwards be tried for manslaughter of the same person because he was in peril of conviction for manslaughter when tried for murder.

W. Blake Odgers in reply. The authorities may be conflicting, but the case of *Reg.* v. *King* (3) is a clear authority in favour of the appellant; and there are other cases which shew that, if the

(1) (1849) 3 Car. & K. 193.

(2) (1910) 5 Cr. App. Rep. 197.

(3) [1897] 1 Q. B. 214.

(4) (1857) 46 Cent. Cr. Ct. Sess. Pap. 884; 10 Cox, C. C. 481, n.

(5) (1882) 15 Cox, C. C. 85.

(6) (1909) 3 Cr. App. Rep. 13.

(7) (1842) Car. & M. 609.

(8) (1882) 15 Cox, C. C. 29.

(9) (1578) 4 Rep. 46b.

(10) (1876) 13 Cox, C. C. 217.

facts and evidence are the same, a person cannot be charged twice: *Rex* v. *Sheen* (1); *Reg.* v. *Elrington* (2); *Reg.* v. *Grimwood.* (3)

Cur. adv. vult.

March 23. The judgment of the Court (Lord Reading C.J., A. T. Lawrence and Lush JJ.) was delivered by

Lord Reading C.J. (4) The appellant was indicted before Ridley J. on a charge of gross indecency with a boy. He pleaded autrefois acquit, but his plea was overruled. He then pleaded guilty and was sentenced to eighteen months' hard labour. He has appealed to this Court, and his counsel contended that the learned judge was wrong in rejecting the plea.

The facts are as follows: The appellant had been previously indicted, on the same facts, on a charge of sodomy with the same boy. He was convicted and sentenced. He appealed to this Court, and the Court quashed the conviction on the ground that evidence had been wrongly admitted. Following the provisions of s. 4, sub-s. 2, of the Criminal Appeal Act, 1907, a judgment and verdict of acquittal were entered. The indictment on which he was subsequently tried was still on the file, and the Court ordered that the appellant "be remanded to custody to take his trial at the next assizes upon a certain other indictment found against him."

Mr. Blake Odgers on his behalf contended that the learned judge had wrongly refused to entertain the plea of autrefois acquit on the ground that he was precluded by the order of the Court from doing so. The learned judge does appear to have taken this view. It is a view with which we do not agree. The order of the Court of Criminal Appeal did not deprive him of any defences that were available, and the plea of autrefois acquit was as open to the appellant as if no order had been made by this Court. The learned judge, however, while declining to hear Mr. Blake Odgers's argument, held that the plea was bad in law, and we have to say whether we agree or not with that ruling.

(1) (1827) 2 C. & P. 634.

(2) (1861) 1 B. & S. 688.

(3) (1896) 60 J. P. 809.

(4) The judgment was written.

We have carefully considered the able arguments that were presented to us by the learned counsel and the cases that were cited to us, and we are of opinion that the plea of autrefois acquit was rightly rejected. The principle on which this plea depends has often been stated. It is this, that the law does not permit a man to be twice in peril of being convicted of the same offence. (1) If, therefore, he has been acquitted, i.e., found to be not guilty of the offence, by a Court competent to try him, such acquittal is a bar to a second indictment for the same offence. This rule applies not only to the offence actually charged in the first indictment, but to any offence of which he could have been properly convicted on the trial of the first indictment. Thus an acquittal on a charge of murder is a bar to a subsequent indictment for manslaughter, as the jury could have convicted of manslaughter. (2)

Now the appellant, having by order of this Court, on his appeal from his first conviction, had a judgment and verdict of acquittal entered, is in the same position for all purposes as if he had actually been acquitted. The question, therefore, that we have to consider is whether the acquittal on the charge of sodomy involves, according to the principles that we have stated, an acquittal on the charge of gross indecency. Mr. Blake Odgers contended that the true test by which this question has to be decided is this: Were the facts which were in evidence at the first trial the same facts as those on which the prosecution relied in support of the second indictment? If they were, he says that the appellant was "in peril" on the former trial, notwithstanding that the appellant could not at the trial on the first indictment for the more serious offence have been convicted of the minor offence. He cited in support of this contention, mainly, the case of *Reg.* v. *King*. (3) The head-note to the report of this case states that "a defendant who has been convicted upon an indictment charging him with obtaining credit for goods by false pretences cannot be afterwards convicted upon a further indictment charging him with larceny of the same goods," and

---

(1) 2 Hawkins, P. C., c. 35 (ed. 1824).

(2) 2 Hale, P. C., p. 246 (ed. 1800).

(3) [1897] 1 Q. B. 214.

1914

REX
v.
BARRON.

Hawkins J. is reported as having said (1): "It is against the very first principles of the criminal law that a man should be placed twice in jeopardy upon the same facts: the offences are practically the same, though not their legal operation." It is quite plain that the learned judge did not intend to lay down and did not lay down as a general principle of law that a man cannot be placed twice in jeopardy upon the same facts if the offences are different. The statement obviously refers to a case where the offences are the same, "practically the same" the words are, and as the two offences in the present case are not either exactly or practically the same it does not help the appellant. But the words are omitted in the report of the same judgment in the *Law Journal* report (2), and it seems reasonably clear from that report that the learned judge was really expressing the view that, having regard to the conviction of the defendant on the first indictment of obtaining credit for the *same* goods by false pretences and also by fraud, the judge should not, as a matter of fairness and in the exercise of a proper judicial discretion, have allowed the second trial to take place, which is, of course, a very different proposition. Cave J., in the same case, said that the question was, "whether a person who has been convicted of obtaining goods by false pretences can be tried upon an indictment for stealing the *same* goods. I think he cannot." (2) It would appear that the decision of the Court was given, either because in the exercise of his discretion the judge should not have permitted the trial for larceny, or because the verdict in the first trial was based upon a view of the facts which was inconsistent with that necessary to support the further indictment. At the first trial the conviction implied that the property in the goods passed to the defendant with the consent of the owner, who was induced thereto by false pretences, whereas conviction at the trial for larceny implied that the defendant feloniously took the goods without the consent of the owner.

The substantial identity of the offence was recognized in *Reg.* v. *King* (3) as an essential condition to the validity of the plea of autrefois acquit, and that case made no change in the general and well settled principle of law applicable to these pleas. The test is not, in our opinion, whether the facts relied upon are the same in the two trials. The question is whether the appellant has been acquitted of an offence which is the same offence as "gross indecency," i.e., whether the acquittal on the charge of sodomy necessarily involves an acquittal on the charge of gross indecency. It is quite clear that the jury could not have convicted the appellant of gross indecency at the first trial. And it is equally clear that the acquittal on the graver charge did not necessarily involve an acquittal of the minor offence. The graver charge of sodomy involves gross indecency and something else, and, as was decided in *Reg.* v. *De Salvi* (1), an acquittal of the whole of an offence does not involve an acquittal of every part of it. There has, therefore, been no verdict that the appellant was not guilty of gross indecency, and the appellant has never been in peril before of being convicted of gross indecency.

---

(1) [1897] 1 Q. B. at p. 218.

(2) 66 L. J. (Q. B.) 87, 90.

(3) [1897] 1 Q. B. 214.

The rule of law now affirmed by this Court has never been doubted or qualified, though it has not always been found easy to apply the rule to the facts of particular cases under discussion. In this case penetration was an essential element of the charge of sodomy, and intention to penetrate of an attempt to commit that offence. Neither the act of penetration nor the intention to penetrate is an essential element of the offence of "gross indecency," so that the offence to which the appellant eventually pleaded guilty at the second trial is not the same or substantially the same as that charged against him at the first trial.

For these reasons the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellant: *Registrar of the Court of Criminal Appeal.*

Solicitor for the Crown: *Director of Public Prosecutions.*

J. H. W.

---

(1) 10 Cox, C. C. 481, n.; 46 Cent. Cr. Ct. Sess. Pap. 884.

[IN THE COURT OF APPEAL.]

C. A.

1913

Oct. 15; *Nov.* 24.

HARBIN *v.* GORDON AND ANOTHER.

Practice—Costs—Taxation—Plaintiff's Travelling and Personal Expenses—Condition of Allowance—Jurisdiction of Taxing Master.

Followed. GIBBS *v.* GIBBS [1952] P. 332

A plaintiff who lived at Florence recovered judgment in an action. Upon taxation of the plaintiff's costs as between party and party the taxing Master fixed a certain sum as proper to be allowed in respect of the plaintiff's travelling and hotel expenses, &c., but made it a condition of its inclusion in his allocatur that the plaintiff's solicitors should produce to him either a voucher acknowledging the receipt by the plaintiff from his solicitors of the said sum or a letter from the plaintiff intimating that he had knowledge of the amount as allowed:—

Held by Buckley L.J. and Kennedy L.J. (Vaughan Williams L.J. dissenting), that the taxing Master was entitled to impose the condition on the allowance of the sum in his allocatur.

Per Curiam: The taxing Master's allocatur not having in fact been given, the plaintiff was wrong in taking out a summons before a judge in chambers to set aside the decision of the taxing Master in respect of the items complained of.

Appeal of the plaintiff from an order of Scrutton J. on appeal from the decision of a taxing Master on the taxation of a bill of costs as between party and party.

In June, 1913, the plaintiff recovered judgment against the defendant for 5500*l.* and costs. The plaintiff resided in Florence, and for the purposes of the trial was compelled to come to England and to stay there for some days, paying his expenses out of his own pocket. Upon the taxation of the plaintiff's bill of costs the Master decided that 33*l.* 12*s.* was a proper sum to allow the plaintiff for his expenses, but made it a condition of the allowance that the plaintiff's solicitors should produce either a voucher acknowledging the receipt by the plaintiff from his solicitors of the said sum or a letter from the plaintiff intimating that he had knowledge of the amount so allowed. The plaintiff's solicitors carried in objections to the taxation which, with the answers of the taxing Master, are here set out.

"The plaintiff objects for the following reasons to the total disallowance of the amount fixed by the Master in respect of the following items:—Plaintiff's expenses—Journey from Florence, 3 days, viz. from 5 to 8 June, 1913—Waiting in London for trial, 4 days, viz. from 9 to 12 June, 1913—Attending trial, 12 June, 1913—Journey back to Florence, 3 days—Paid hotel expenses—Travelling expenses."

"Reasons. The Master has found that 33*l.* 12*s.* would be the proper allowance for the plaintiff's loss of time, maintenance and travelling expenses from Florence to give evidence in support of his own case, but has required as a condition of its inclusion in the allocatur that the plaintiff's solicitors produce either a voucher acknowledging the receipt by the plaintiff from his solicitors of the said sum or a letter from the plaintiff intimating that he has knowledge of the amount as allowed. It is respectfully submitted that no such condition should be imposed on the following grounds. First. As to the voucher.

"A. The solicitor in an action cannot be called on to finance his client. There can be no possible obligation on the solicitor to provide money to enable his client to attend the trial nor to pay to the client money which the client has disbursed for this purpose relying on the unsuccessful party to pay the amount of the allocatur in full.

"The Master has treated the amount proper for allowance to the plaintiff exactly in the same manner as if plaintiff were a witness who was not a party to the action.

"It was never the practice in affidavits of increase for the attorney to swear that he has paid the sum allowed for the attendance of the successful party to the cause, though he had to swear to the payments to all other witnesses.

"B. The voucher required would represent as a fact that the money had passed hands or at the least had been actually credited in account.

"Although it would be no fraud on the client for the solicitor to obtain his voucher without actual payment or credit it is submitted that it would be misconduct in the solicitor to utter to the taxing Master a voucher containing a false representation of fact.

"Credit in account bona fide given would practically place the solicitor in the same position as actual payment.

"Secondly. As to the letter from the plaintiff intimating that he has knowledge of the amount allowed to him by the Master,

C. A.
1913
HARBIN
v.
GORDON.

and that his actual expenses as a witness incurred by him for journey, board and lodging in fact were no less than that amount. It is further respectfully submitted as follows:—

"C. Upon a taxation as between party and party this is not a requirement which can properly be made, as the functions of the Master on such a taxation are limited to ascertaining that the charge presented for allowance has been incurred and is proper in its nature and reasonable in amount, and that the charge should then be allowed against the defendant.

"D. There is no better reason for the requirement in regard to this particular item than in regard to any other item or to the total of the bill. The solicitor must as a matter of course carry into account for credit of the client the full sum which he receives for taxed costs, and the client in this way obtains due and proper credit for the sum which the solicitor collects in respect of allowance for client's expenses just in the same way as he obtains credit for every other portion of the taxed bill."

The answers of the taxing Master were as follows:—

"A and B. The only claim that the plaintiff has for reimbursement is as a witness. Apart from that he has no other claim and he must be treated on the same footing as other witnesses, and the Masters have decided that the solicitors must produce a voucher for the amount allowed to plaintiff or defendant as a witness.

"C and D. Secondly. Having regard to the fact that the solicitors may not receive the amount allowed to them on this taxation for this witness from the defendant, I have stretched a point and stated that I should be satisfied if the solicitors produce a letter signed by the plaintiff that he is cognizant of the amount awarded to him as a witness, but this they have refused.

"It is obvious that a solicitor might receive the amount allowed to the plaintiff or defendant as a witness on the certificate and not disclose it to his client, and it is only, I believe, of recent years that the plaintiff or defendant as parties to an action have been allowed any remuneration as witnesses therein. Disallowed." (1)

---

(1) It was stated in Court that the Master had not made his allocatur for the costs.

The plaintiff took out a summons before Scrutton J. in chambers "to shew cause why the decision of the taxing Master should not be set aside and the items in respect of which objections have been carried in should not be allowed"; the learned judge upheld the decision of the taxing Master. The plaintiff appealed.

Rayner Goddard, for the plaintiff. The Master cannot demand as a condition precedent to the inclusion of the sum in the allocatur that the plaintiff's solicitors shall produce a voucher signed by the plaintiff acknowledging receipt of the money. If the Master is satisfied that the sum has been paid by the client, he must include it in the allocatur, and it is absurd to ask for a receipt by the client who has paid the money. The Master cannot ask for a voucher for money which has not in fact been paid. The voucher asked for was a voucher for something received by the plaintiff from his solicitors. If given, it would have been a false voucher, for the plaintiff had not received it from them. It is no part of a party and party taxation to protect the client against his own solicitor; its object is to protect the unsuccessful party against the successful one. The same objections apply to the letter as apply to the voucher. [He cited *Howes* v. *Barber* (1); *Calvert* v. *Scinde Ry. Co.* (2)]

The defendant did not appear and was not represented.

VAUGHAN WILLIAMS L.J. We will consult the Master.

Cur. adv. vult.

1913. Nov. 24. VAUGHAN WILLIAMS L.J. read the following written judgment:—In the present case there was a taxation in progress between party and party in an action in which Guy Philip Harbin, the plaintiff, had obtained judgment against Herbert M. Gordon and H. C. Rigaud, the defendants.

The taxing Master had expressed an intention to allow 33*l.* 12*s.* as the proper allowance for the plaintiff's loss of time, maintenance, and travelling expenses from Florence to give evidence in support

(1) (1852) 18 Q. B. 588.

(2) (1865) 18 C. B. (N.S.) 306.

of his own case, but had required as a condition of this inclusion in the allocatur (which has never been made) that the plaintiff's solicitors produce either a voucher acknowledging the receipt by the plaintiff from his solicitors of the said sum or a letter from the plaintiff intimating that he has knowledge of the amount as allowed.

It was decided in *Sellman* v. *Boorn* (1) that an application to review the taxation of costs ought not to be made before the Master has made his allocatur, as he has not, until doing so, finally decided what costs he will allow. Parke B. says: "The Master has not finally decided as to the costs until he has made his allocatur. Until he has done so, it is still open to him to alter his mind, and he is not bound by any declaration he may have made as to what costs he intends to allow."

The plaintiff entitled to the taxation of party and party costs is entitled as against the defendant to an allocatur for party and party costs. The object of the taxation is to protect the defendant from undue claim by the plaintiff for costs. If the plaintiff has reason to suppose that his solicitor is overcharging him he can get protection by a solicitor and client taxation.

What has happened in the present case may briefly be stated as follows: The Master, who, as I have already said, has not at present given an allocatur or concluded the taxation, has intimated that 33*l.* 12*s.* would be a proper allowance for the plaintiff's loss of time, maintenance, and travelling expenses from Florence to give evidence in support of his own case, but has required as a condition of its inclusion in the allocatur that the plaintiff's solicitors produce either a voucher acknowledging the receipt by the plaintiff from his solicitors of the said sum or a letter from the plaintiff intimating that he has knowledge of the amount so allowed. This is objected to on the following grounds. As regards the voucher: "A. The solicitor in an action cannot be called upon to finance his client. There can be no possible obligation on the solicitor to provide money to enable his client to attend the trial nor to pay to the client money which the client has disbursed for this purpose relying on the unsuccessful party to pay the amount of the allocatur in full. The Master

---

(1) (1841) 8 M. & W. 552.

C. A.
1913

HARBIN v. GORDON.

Vaughan Williams L.J.

has treated the amount proper for allowance to the plaintiff exactly in the same manner as if plaintiff were a witness who was not a party to the action. It was never the practice in affidavits of increase for the attorney to swear that he has paid the sum allowed for the attendance of the successful party to the cause, though he had to swear to the payments to all other witnesses.

"B. The voucher required would represent as a fact that the money had passed hands or at the least had been actually credited in account. Although it would be no fraud on the client for the solicitor to obtain the voucher without actual payment or credit it is submitted that it would be misconduct in the solicitor to utter to the taxing Master a voucher containing a false representation of fact. Credit in account bona fide given would practically place the solicitor in the same position as actual payment."

The Master's answer to the two grounds is as follows: "The only claim that the plaintiff has for reimbursement is as a witness. Apart from that he has no other claim, and he must be treated on the same footing as other witnesses, and the Masters have decided that the solicitors must produce a voucher for the amount allowed to plaintiff or defendant as a witness."

As regards the letter, the following objections are made: "C. Upon a taxation as between party and party this is not a requirement which can properly be made, as the functions of the Master on such a taxation are limited to ascertaining that the charge presented for allowance has been incurred and is proper in its nature and reasonable in amount, and that the charge should then be allowed against the defendant. D. There is no better reason for the requirement in regard to this particular item than in regard to any other item or to the total of the bill. The solicitor must as a matter of course carry into account for credit of the client the full sum which he receives for taxed costs, and the client in this way obtains due and proper credit for the sum which the solicitor collects in respect of allowance for client's expenses just in the same way as he obtains credit for every other portion of the taxed bill"; to which the Master's answer is: "Secondly. Having regard to the fact that the solicitors may not receive the amount allowed to them on this taxation for this witness from the defendant, I have stretched a point and stated that I should be satisfied if the solicitors produce a letter signed by the plaintiff that he is cognizant of the amount awarded to him as a witness, but this they have refused. It is obvious that a solicitor might receive the amount allowed to the plaintiff or defendant as a witness on the certificate and not disclose it to his client, and it is only I believe of recent years that the plaintiff or defendant as parties to an action have been allowed any remuneration as witnesses therein."

Now in my judgment the plaintiff ought not to have taken out the summons before Scrutton J. to shew cause why "the decision of the taxing Master should not be set aside and the items in respect of which objections have been carried in should not be allowed," because in form this is a summons to review taxation, and I will assume that there is no other basis upon which this summons can be recognized. The summons came before Scrutton J. and he dismissed it, not on the ground that he had no jurisdiction, but on the ground that he did not propose to interfere with the rule on which taxing Masters act "that solicitors may not receive the amount allowed to them on taxation unless they produce the client's voucher for his expenditure as a witness and for loss of time, or in the alternative produce a letter signed by the client that he is cognizant of the amount awarded to him as a witness."

The Master to this answer appended the statement that a solicitor might receive the amount allowed to the client as a witness on the certificate and not disclose it to his client.

Now what is the legal outcome of the state of things which I have recited? First: on my assumption, there was no jurisdiction in the judge to hear the summons, and he should have declined to hear it and have dismissed it altogether, but he did not do this, but dismissed it on the ground of the rule made by the taxing Masters that solicitors may not receive the amount allowed to them on taxation except upon the conditions heretofore stated.

Secondly, I am of opinion that there was no jurisdiction in the judge to make the order, and that the order which he made on that summons was not only wrong on the ground of want of

Vaughan Williams L.J.

jurisdiction, because such an order could only be made on a review of taxation, but also was wrong because, assuming the judge had jurisdiction, the order of the taxing Master on which it was based was itself wrong. The Master's jurisdiction on a party and party taxation is to insist upon vouchers being given by the witness, be he plaintiff or otherwise, for the items of expenditure. It is no part of the duty of a taxing Master on taxation of costs as between party and party to protect the client from anticipated possible frauds of the solicitor.

I will assume that the summons before the judge was without jurisdiction, but, assuming that the judge took on himself jurisdiction, and made the wrong order, what ought the aggrieved person to do? Has he no remedy? Or may he appeal? I think that he must have a right of appeal, but whether he has or not and whether the appeal is dismissed or not, in my judgment no costs should be given against him. All this is of small importance, as far as the litigants are concerned, but as a matter of practice the case is of great importance, for it involves the question whether the Masters had any jurisdiction or authority to make the order on which Scrutton J. based his judgment.

In my judgment the Masters had no jurisdiction to make the rule which they have made and which has been applied in a party and party taxation. The object of the rule is to prevent solicitors from dishonestly failing to disclose the amount that they may have received from the party liable. The rule casts an uncalled-for slur on solicitors as a profession.

I wish to say a few words as to the case of *In re Le Brasseur and Oakley*. (1) Lindley L.J. there says in the course of his judgment: "Now, first, as to the procedure. The learned judge himself said that the procedure had been all wrong, and that with regard to the supposed order of the taxing Master, which in the notice of motion is treated as an order of April 21, 1896, by which the Master directed the solicitors to file an affidavit and to produce documents, there never was any such order, and the whole thing is a myth. As I understand the facts, there was only an expression by the taxing Master of his intention to require these things to be done. The application, therefore, to the

(1) [1896] 2 Ch. 487.

judge for an expression of his opinion was utterly irregular. Kekewich J. felt that and said so. But he said that, inasmuch as the case had been discussed before him and the matter was one of some importance, he would, notwithstanding the irregularity of the procedure, express his opinion on the point, and he did so. I cannot help thinking it would have been very much better if the learned judge had declined to hear the motion at all." Similarly, I think it would have been better if Scrutton J. had refused to entertain the application in the present case. Lindley L.J. goes on to say: "It is entirely contrary to the present practice. I do not say such a thing was never done in old times—perhaps it was. But ever since the present rules have been in existence—I refer to Order LXV., r. 27, sub-rr. 39—42—the mode of procedure on questions of this kind is this: the taxing Master has to make his certificate; the party who is dissatisfied has to carry in objections to the certificate; the taxing Master has to answer the objections, and then the dissatisfied party appeals. In this way the Court before whom the case comes knows exactly what the facts are; whereas, by this short cut, although it has some advantages which Kekewich J. thought justified him in making his order, the Court is in truth acting on a hypothetical state of things without knowing the real facts at all. That this course is irregular is obvious from reading the rules. I do not propose to go into them—they are perfectly clear; and I can only venture to express my regret that the learned judge did not decline to hear the motion, and dismiss it altogether. However, inasmuch as the learned judge did go into the merits of the case, and we also have heard the merits fully discussed, I am not prepared to say that it is our bounden duty to be such martinets as to dismiss the appeal without saying anything about the controversy which is really at the bottom of it. I shall therefore state my opinion on the merits of the case. At the same time, I protest against any procedure of this kind, and venture to express a hope that it will not be made a precedent. If it is, the Court of Appeal will not be so indulgent as it is now."

Under the circumstances I think that the order in the present case should be that the appeal should be dismissed but without any costs against the plaintiff.

BUCKLEY L.J. read the following written judgment:—The plaintiff in this action was called as a witness. The taxing Master arrived at the conclusion that 33*l.* 12*s.* was a proper allowance to him for time, maintenance, and travelling expenses from Florence to give evidence in the case. The question is whether the taxing Master was right in requiring, before he included that amount in his allocatur, that the plaintiff's solicitors should produce to him either a voucher signed by the plaintiff acknowledging that the amount had been paid to him or a letter from the plaintiff intimating that he knew that the amount had been allowed to him.

The plaintiff, as a party litigant, was not entitled to any allowance, but as a witness he was entitled to an allowance like any other witness, and none the less because he was also a party litigant. If he had not been a party litigant, but an ordinary witness, the taxing Master would have been entitled to require evidence that the amount had been paid before he included it in his allocatur for recovery from the defendant. The whole question is whether, when he is a party litigant, the taxing Master is not also entitled to be satisfied that the amount has been paid or that the plaintiff knows that it is going to be recovered for him from the defendant. In my opinion he is so entitled.

During the argument, confusion has repeatedly arisen between the question as to what evidence ought to be adduced to shew what the witness's out of pocket expenses have been and what is proper evidence to be required to shew that the amount allowed him has been paid. Upon the former question his hotel bills, his receipts (if he has any) for his railway tickets, and so on, are relevant. To the amount ascertained from those materials would be added the amount which the taxing Master thinks right as an allowance for his time. All has been done in the present case that the taxing Master requires in this respect, with the result that he is satisfied that 33*l.* 12*s.* is the proper sum to be allowed. What remains is that the Master, before charging the defendant with the amount, should be satisfied that this sum has been expended in payment to the plaintiff or when recovered will be recovered for the plaintiff. The plaintiff no doubt cannot sign a receipt for the amount unless the amount is actually paid to him. This could be done by his solicitor personally paying him the amount out of his own pocket. But to require that would be unreasonable, for the solicitor might pay the sum, the defendant might then fail to pay the taxed bill, and the solicitor might not get the sum back. The requirement of the taxing Master under those circumstances to be satisfied that the plaintiff knows that that amount has been allowed him seems to me perfectly reasonable and so reasonable that I am surprised that it is disputed. The acknowledgment is something less than a voucher, but is a protection both to the defendant and to the plaintiff which no solicitor can reasonably refuse. I think the appeal fails and should be dismissed.

It is true that the summons is wrong in point of form. The taxing Master has not issued his allocatur and there is at present no concluded taxation which can be made the subject of review. That such procedure was wrong was pointed out by Lindley L.J. in *In re Le Brasseur and Oakley.* (1) But I think, as the Court thought in that case, that we ought not to refuse to deal with the matter on that ground. The question for decision lies in the smallest compass, we have all the materials for determining it, the judge has determined it, and I see no reason why we should not pronounce an opinion upon it. To refuse to do so would be merely to occasion a new application which must first come before the judge and then before this Court when the decision of this Court would be already known. At the same time I hope that this case will not be treated as a precedent for such irregularity in the future.

KENNEDY L.J. read the following written judgment:—In this case I agree with Buckley L.J. that the appeal must be dismissed, and I concur in the reasons which he has given for that conclusion. I will say only this: The appellant has been, in my judgment, wrong throughout. His original proceeding by summons, instead of applying to review the taxation after the

(1) [1896] 2 Ch. 487.

C. A.
1913

HARBIN
v.
GORDON.

Kennedy L.J.

allocatur had been given, was irregular, and, in regard to the merits, there was no good ground for his objection to the Master's decision. That decision was, in substance, that as a voucher, in the sense of a formal receipt for the item of expenses and compensation for the loss of the plaintiff's time for which his solicitor claimed allowance, could not, or, at least, could not without great practical inconvenience, be produced, an equivalent in the form of a written and signed acknowledgment by the plaintiff that he was cognizant of the amount awarded to him as a witness should be supplied. It appears to me that the course adopted by the Master, which I understand to be in accordance with the usual practice, was not open to any just objection; that Scrutton J. rightly refused to accede to the plaintiff's application, and that this appeal against the refusal therefore fails.

Appeal dismissed.

Solicitors for plaintiff: *Chester & Co.*

W. J. B.

C. A.
1914
Feb. 23, 24, 27.

[IN THE COURT OF APPEAL.]

THE KING *v.* MELLOR.

County Court—Remitted Action—Refusal of Judge to try—"Court convenient thereto"—Duty of County Court Judge—County Courts Act, 1888 (51 & 52 *Vict.* c. 43), *s.* 65.

By s. 65 of the County Courts Act, 1888, "where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed 100*l.* . . . . it shall be lawful for either party to the action . . . , to apply to a judge of the High Court at chambers to order such action to be tried in any Court in which the action might have been commenced, or in any Court convenient thereto; and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly":—

Held, that the words "in any Court convenient thereto" mean in any county court which the judge at chambers may deem to be convenient to the parties; and the judge has a discretion to exercise upon the question of convenience which must vary according to the circumstances of each case.

Where an order is made under the above section for the trial of an action in a county court, the county court judge has no jurisdiction to nquire into what circumstances were taken into account when the order was made, or into the question whether his Court is a convenient Court or is convenient to the parties, or whether any other Court would be more convenient, or the like. His duty is to obey the order and try the action in due course in its proper turn, as if it had been an action originally commenced in his Court. It can only occur in an exceptional case that an order under s. 65 may possibly be made without jurisdiction, and if the county court judge is of opinion that the order is invalid for want of jurisdiction, it is his duty to give a judgment on the point with reasons, stating fully the grounds upon which he has come to the conclusion that the order has been made without jurisdiction; and he should then adjourn the hearing to enable either party to raise the question of jurisdiction in the High Court, if he should desire to do so.

Where the High Court makes an order under s. 131 of the County Courts Act, 1888, directing a county court judge to hear and determine an action which he has refused to hear, the Court can only deal with the costs of the proceedings before it, and has no jurisdiction to order the county court judge to pay the costs thrown away in the county court by reason of his refusal to hear the action.

Churchward v. *Coleman* (1866) L. R. 2 Q. B. 18 followed.

APPEAL from an order of a Divisional Court.

On February 8, 1913, an action of *Bickerton* v. *Royal London Auxiliary Insurance Company, Limited*, was brought in the King's Bench Division of the High Court of Justice, the writ of summons being issued out of the Manchester District Registry, in which the plaintiff claimed 41*l*. 16*s*. 6*d*., balance of account for commission earned by him as agent for the defendants. Upon an application under Order XIV., r. 1, for leave to sign final judgment for the amount claimed, the Master on February 28, 1913, gave the defendants leave to defend and ordered the action to be remitted to the Manchester County Court under s. 65 of the County Courts Act, 1888. The action was duly entered for trial in the Manchester County Court, and upon the case coming into the list for trial on April 28, 1913, the county court judge refused to try it and struck it out of his list. The plaintiff thereupon obtained a rule under s. 131 of the County Courts Act, 1888, directed to the county court judge and the defendants, to shew cause why the judge should not proceed to hear and determine the action.

It was stated in the affidavits filed in support of the rule that the plaintiff was at the material time an insurance broker residing at Liverpool and carrying on business at Liverpool and

Manchester; that he instructed his solicitor, who practised at Manchester, to bring the action to recover the 41*l*. 16*s*. 6*d*. against the defendant company, whose registered office was in London, and that the writ was accordingly issued out of the Manchester District Registry; that when the application under Order XIV., r. 1, came before the Master, and after the Master had given leave to defend, upon the managing clerk to the London agents of the plaintiff's solicitor pointing out "that the writ in the action had been issued out of the Manchester District Registry, that the plaintiff had an office in Manchester, and that the plaintiff's solicitor practised in Manchester, and upon the solicitors for the said company (the defendants) pointing out that Manchester would be more convenient to them and their witnesses than Liverpool, where the cause of action actually arose, the said Master with the concurrence of all parties to the action" remitted the action for trial in the Manchester County Court.

The plaintiff's Manchester solicitor stated in his affidavit that on March 13, 1913, he duly entered the action for trial in the Manchester County Court, and on April 28, 1913, the day fixed for the trial of the action, he attended the Court with the plaintiff and the defendant company attended by their counsel and solicitor with two witnesses from London; that the judge called the case on out of its turn, and asked how it happened that the case was sent to his Court, when he was told that it had been remitted by an order of the High Court; that thereupon he said he was not going to try it; and that his attention was called to s. 65 of the County Courts Act, 1888, when he said that "this is not a convenient Court to Liverpool. Why don't you take it to Liverpool? There are two judges there and only one here. I do as much work here alone as those two judges put together. This is not a convenient Court for a London and Liverpool action. This sort of thing has been done before, and I am not going to take the case." That upon it being suggested that if any question of jurisdiction were involved the parties would agree, in order to save expense, to the judge trying the case, the judge replied, "If I have to try it, I will put it at the bottom of the list day after day and adjourn it until you are tired of it and the claim swallowed up in costs. However, I am not going to do that; I shall strike it out and you can take what proceedings you like."

An affidavit made, after the rule had been granted, by the managing clerk to the defendants' solicitors stated that when the application came before the Master on February 28, 1913, he submitted to the Master that, having regard to the fact that the defendant company's head office was in London and that it would be necessary to call a witness from such office, the trial should take place in London; but the Master intimated that he would not make an order for trial in London, and the managing clerk then stated that it was immaterial to the company whether the action was sent for trial at Liverpool or Manchester, and he did not further oppose the plaintiff's application for trial at Manchester.

The county court judge made an affidavit in opposition to the rule in which he stated: "It is not true that I said, 'If I had to try it I should put the case at the bottom of the list and adjourn it until the parties are tired of it and the claim swallowed up in costs.' What I did say was that I had been told that it was the practice of some of my colleagues to take that course, but that, as I did not approve of it, I thought the best way was to strike it out and so raise the question. I am informed by" the clerk to the registrar of the Court "that when the papers in this action were lodged in the Manchester County Court on March 13, 1913, the plaintiff's solicitors were asked where the cause of action had arisen. They stated that it had arisen either in Liverpool or in London, but certainly not in Manchester. There was nothing in the papers to shew that the plaintiff had any place of business in Manchester at all. They were then informed that in view of the fact that both parties to the action were resident out of the district of the Manchester County Court some difficulty would probably arise when the case came before the judge. The defendants and their witnesses came from London, the plaintiff resides in Liverpool, and" the plaintiff's solicitor "is the only person whose convenience might be affected by the trial of the case taking place at Manchester instead of at

Liverpool. So far as the defendants were concerned it would be a matter of indifference whether the case was tried at Manchester or at Liverpool. I called the case on out of its turn for the purpose of relieving the parties as soon as possible, as the witnesses came from London, my attention having been called to the case by the officials of the Court. Manchester is a very busy Court, and it was only last year that the Manchester Incorporated Law Society were petitioning the Lord Chancellor for additional sittings, and I am informed that this matter has been again pressed recently. There were over 900 workmen's compensation cases to be dealt with last year in addition to the ordinary business. It is not the first time that cases have been sent to Manchester for trial that have had no connection with the district. I submit that if the above facts had been properly brought before the learned Master and his attention called to the hardship inflicted upon parties whose only available Court is the Manchester Court by sending to it cases having no connection with the district he would not have sent this case for trial at Manchester."

The Divisional Court (Ridley, Scrutton, and Bailhache JJ.) made the rule absolute that the county court judge "do proceed to hear and determine pursuant to the statute in that behalf" the said action "and it is further ordered that the said judge do pay to the said James Bickerton and the said Royal London Auxiliary Insurance Company Limited or their respective solicitors their costs of and occasioned by this motion and the costs thrown away in the Court below, such costs to be taxed by one of the taxing Masters."

The county court judge appealed to the Court of Appeal, and made a further affidavit as follows (1): "It is a matter of great regret on my part that in the action which I took in this case I should have appeared to the High Court to have been guilty of disrespect to the High Court or to be contumaciously disobeying its order. Had I anticipated that this view would be taken by the Court I should have explained the matter more fully in my previous affidavit, and I desire to make this affidavit for the purpose of assuring the Court that I was actuated by no such feelings, and of explaining my object in taking the course which I adopted. As it appeared to me that there was at least a serious doubt whether upon the true construction of s. 65 of the County Courts Act, 1888, there was any jurisdiction in the High Court to remit such a case as that in question to the Manchester County Court, I desired in the interest of the litigants for whom the said Court is the only one available that the attention of the High Court should be called to the question, and a considered judgment obtained. I was not aware of any reported case in which the method by which a county court judge, who doubted the jurisdiction of the High Court to remit a particular case to his Court, could procure a decision of the High Court upon the question, and I took the course of declining to try the case, not with the intention of shewing any disrespect to the order of the High Court, but solely because it was, so far as I was aware, the only course open to me by which a decision of the High Court upon the question of jurisdiction could be obtained. I have since had my attention called to two cases in which the High Court has pronounced upon the course to be adopted by a county court judge in the circumstances in which I found myself. In *Parsons* v. *Lakenheath School Board* (1), which was not cited to the Divisional Court, Field J. is reported to have said that in such a case the better course for the purpose of testing the matter is for the county court judge to refuse to hear the case so that the point may be raised upon an application for a mandamus. In the other case of *Reg.* v. *Judge of Marylebone County Court* (2) Day J. indicated that the proper course was for the county court judge to adjourn the case before him, and to make a special report to the High Court calling attention to the doubt as to the jurisdiction. As I have said I was not aware of either of these authorities when I refused to hear the case in question, but it appears that my action had at all events the support of the opinion of Mr. Justice Field. I am and always have been desirous of submitting to any order which the Court may think fit to make upon this application, but I hope that in any event I may be acquitted of any intentional failure in the respect and obedience due to the High Court."

---

(1) This affidavit was read by leave of the Court of Appeal.

---

(1) *County Courts Chronicle*, June 1, 1889, p. 128.

(2) (1883) 50 L. T. 97.

Sir John Simon, A.-G., and *Branson*, for the appellant. By s. 65 of the County Courts Act, 1888, an action of contract in the High Court may be ordered to be tried "in any Court in which the action might have been commenced, or in any Court convenient thereto." The action here could not have been commenced in the Manchester County Court to which the Master remitted it (see s. 74), and therefore he purported to remit the action to the Manchester County Court under the latter words of s. 65, namely, "any Court convenient thereto." Before the Master can send an action for trial in such a Court he must apply his mind to the question whether the Court is one "convenient thereto." It is a condition precedent to his making an order to send an action to such a Court that he should have applied his mind to that question. If he does not determine that question, which is preliminary to his jurisdiction, but assumes it on the suggestion of the parties, his jurisdiction to remit to that Court does not exist. "It is a general rule that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends": per Coleridge J. delivering the judgment of the Exchequer Chamber in *Bunbury* v. *Fuller* (1), a passage which was quoted with approval by Blackburn J. in *Pease* v. *Chaytor*. (2) Therefore a tribunal cannot give itself jurisdiction by deciding a point preliminary to its jurisdiction without evidence. If it appears to the county court judge that the Master has never addressed his mind to that question, but has assumed it upon the consent of both parties, as the affidavits in this case would seem to indicate, then the judge has ground for saying that the action has been remitted to his Court without jurisdiction, and for taking such steps, e.g., by refusing to try the action, as will bring the matter before the High Court. In considering which Court is "convenient thereto," all the circumstances must be taken into consideration, and that Court must be selected which upon the

(1) (1853) 9 Ex. 111, at p. 140.

(2) (1863) 3 B. & S. 620, at p. 640.

balance of convenience is considered to be the proper Court. "Convenient thereto" are words of locality: *Curtis* v. *Stovin.* (1) In *Burkill* v. *Thomas* (2) the Divisional Court held that s. 65 gave power to remit the action for trial in any county court in which it could have been commenced with leave under s. 74, and upon appeal (3) the decision was affirmed upon this ground. In the Divisional Court the decision was also based upon the construction of the words "in any Court convenient thereto" in s. 65 as meaning convenient to the parties; but that ground of the decision was not adopted by the Court of Appeal, though they did not express any dissent from it. Willes J. in *Mayor, &c., of London* v. *Cox* (4) said that "in our local Courts the general rule is said to be that the person proceeded against must be resident." He there emphasizes the local character of the jurisdiction of the Court. The county court judge in the present case having reasonable ground for thinking that the order was made without jurisdiction adopted the course of striking the case out of his list with the object of having a decision of the High Court upon it. This is suggested as the proper course by Field J. in *Parsons* v. *Lakenheath School Board.* (5) It is unfortunate that the suggestion of Cave J. in that case has not been adopted that an affidavit as to the facts should be made before an order remitting an action to a county court "convenient thereto" is made, and that the Master ought not to act upon the mere consent of the solicitors. In *Reg.* v. *Judge of Marylebone County Court* (6) the county court judge declined to try a remitted action on the ground that there was no jurisdiction to remit it, and he made a special return to the High Court setting forth the grounds for the course he adopted, and Day J. said that that was the right course to adopt. In *Reg.* v. *Judge of City of London Court* (7) the judge declined to try a counter-claim which had been remitted to him for trial under s. 65 of the County Courts Act, 1888, after the action had been discontinued, upon the ground that he had no jurisdiction to try it, and the Court held that he had no jurisdiction.

(1) (1889) 22 Q. B. D. 513.

(2) [1892] 1 Q. B. 99.

(3) [1892] 1 Q. B. 312.

(4) (1867) L. R. 2 H. L. 239, at p. 270.

(5) *County Courts Chronicle*, June 1, 1889, p. 128.

(6) 50 L. T. 97.

(7) [1891] 2 Q. B. 71.

Those cases shew that the county court judge was entitled to take the course he did in the present case. In view of the different opinions expressed by judges it is desirable that this Court should lay down some definite rule to be followed by county court judges in similar cases. The county court judge was therefore not guilty of any wilful refusal to obey the order of the High Court. The course he took was a proper course, and the rule ought to be discharged. Even if the Court is of opinion that he ought to have tried the action, it will not make the rule absolute, but it will be sufficient to intimate the opinion of the Court, and the judge will follow it. The Divisional Court exceeded its jurisdiction in ordering the judge to pay the costs in the county court: *Churchward* v. *Coleman* (1); and the order as to payment of costs in the Divisional Court ought to be discharged. [*Pearce* v. *Winkworth* (2), *Banks* v. *Hollingsworth* (3), and *Donkin* v. *Pearson* (4) were also referred to.]

McCall, K.C., and *Linton Thorp*, for the plaintiff Bickerton. The order of the Master remitting the action for trial in the county court was valid upon its face, and it was the duty of the county court judge to obey the order and to try the action. If an order on its face shews that it is made without jurisdiction the county court judge may refuse to try the action. He cannot, however, when the order is good upon its face, inquire into the circumstances under which it was made, and say that if the Master had gone into the circumstances he would not have made the order. In *Reg.* v. *Judge of Marylebone County Court* (5) the order was bad on its face because it did not shew that the statutory condition precedent to remitting an action of tort for trial in a county court had been fulfilled. So also in *Reg.* v. *Judge of City of London Court* (6) the order remitting the counterclaim after the action had been discontinued was manifestly bad. The order in the present case being good upon its face, the duty of the judge was to obey it, and in refusing to try the action he was inexcusably or contumaciously wrong and was rightly ordered to pay the costs of the rule: *Blades* v. *Lawrence.* (1) If it were necessary to consider the meaning of the words in s. 65 of the County Courts Act, 1888, "in any Court convenient thereto," the decision of the Divisional Court in *Burkill* v. *Thomas* (2) shews that "convenient thereto" means convenient to the parties, and if the Court of Appeal (3) had dissented from that view it would have said so. The Master here decided upon proper materials. But it is not necessary to consider that question because the county court judge had no right to go behind the Master's order. The county court judge really thought that the Master had exercised his discretion wrongly, and that the case ought to have been sent for trial to the Liverpool County Court and not to the Manchester County Court. It was a wilful disobedience of the order of the Court, and if so it was contumacious disobedience. Sect. 131 of the County Courts Act, 1888, gives the High Court jurisdiction to "make such order with respect to costs as to it shall seem fit." There is no reason to limit the generality of those words and to say that they only apply to the costs of the rule for an order under that section. They include the costs thrown away in the county court owing to the judge having refused to try the action. The order of the Divisional Court was therefore right.

---

(1) L. R. 2 Q. B. 18.

(2) (1873) 28 L. T. 710.

(3) [1893] 1 Q. B. 442.

(4) [1911] 2 K. B. 412.

(5) 50 L. T. 97.

(6) [1891] 2 Q. B. 71.

T. M. Snagge (*F. St. J. Morrow* with him), for the defendants, the Royal London Auxiliary Insurance Company. With regard to the costs in the county court the High Court has jurisdiction to deal with them: *Furber* v. *Sturmey* (4); *Whitehead* v. *Procter* (5); *Gage* v. *Collins.* (6) In this last case doubt seems to have been expressed as to the decision in *Churchward* v. *Coleman* (7), where it was decided that, a county court judge having refused to hear an interpleader claim on the ground of insufficiency of particulars, and having ordered the claimant to pay costs, the Court, on directing the judge under 19 & 20 Vict. c. 108, s. 43, to hear the claim, had no jurisdiction to set aside the order as to costs. This Court therefore has power to deal with the costs both in the county court and in the High Court, and the defendants, who took no part in moving for this rule, ought to be reimbursed all their costs.

---

(1) (1874) L. R. 9 Q. B. 374.
(2) [1892] 1 Q. B. 99.
(3) [1892] 1 Q. B. 312.
(4) (1858) 3 H. & N. 521, at p. 532.
(5) (1858) 3 H. & N. 532.
(6) (1867) L. R. 2 C. P. 381.
(7) L. R. 2 Q. B. 18.

Sir John Simon, A.-G., in reply. *Churchward* v. *Coleman* (1) is a direct authority that the High Court has no jurisdiction to deal with the costs in the county court. Sect. 131 of the County Courts Act, 1888, gives the High Court no power to order a county court judge to pay the costs thrown away in the county court. In *Furber* v. *Sturmey* (2) there is nothing to indicate that the costs which the county court judge was ordered to pay were costs in the county court.

Cur. adv. vult.

Feb. 27. The judgment of the COURT (Vaughan Williams, Kennedy, and Swinfen Eady L.JJ.) was read by

SWINFEN EADY L.J. This is an appeal by his Honour Judge Mellor from an order of the King's Bench Division, dated October 20, 1913, whereby it was ordered that the said judge do proceed to hear and determine pursuant to the statute in that behalf the matter of a certain action of *Bickerton* v. *Royal London Auxiliary Insurance Company, Limited*, which had been remitted from the High Court to be tried in the Manchester County Court, and whereby it was further ordered that the said judge do pay certain costs.

The order remitting the action was made under s. 65 of the County Courts Act, 1888, and in our opinion according to the true construction of that section the county court to which an action in the High Court may be sent for trial is any county court which the judge at chambers may deem to be convenient to the parties. The word "thereto" in the section must be rejected as meaningless, unless it is considered, as we do consider it, as referring to the parties to the action. The judge has a discretion to exercise upon the question of convenience, which must vary according to the circumstances of each case: *Burkill* v. *Thomas*. (3) An order exercising jurisdiction under s. 65 may be made by a judge at chambers, or by a Master, or by a district registrar: Order LIV., r. 12; Order XXXV., r. 6.

---

(1) L. R. 2 Q. B. 18.

(2) 3 H. & N. 521.

(3) [1892] 1 Q. B. 99, at p. 102.

In our opinion, the order of February 28, 1913, remitting the action for trial to the Manchester County Court was properly made, and was a valid order in all respects. Where an order is so made, a county court judge has no jurisdiction to inquire into what circumstances were taken into account when the order was made, or into the question whether his Court is a convenient Court or is convenient to the parties, or whether any other Court would be more convenient, or the like. His plain and simple duty is to obey the order and try the action in due course in its proper turn, as if it had been an action originally commenced in his Court.

Having regard to the interpretation which we have placed upon s. 65, it can only occur in some exceptional case that an order may possibly be made without jurisdiction. If the county court judge is of opinion that any remitted action is such a case, and that the order is invalid for want of jurisdiction, we are of opinion, and now lay it down as a rule to be followed, that the duty of the county court judge is to give a judgment on the point with reasons stating fully the grounds upon which he has come to the conclusion that the order was made without jurisdiction. He should then adjourn the hearing, to enable either party to raise the question of jurisdiction in the High Court, if he should desire to do so. The practice upon this point has not always been uniform.

In *Reg.* v. *Judge of Marylebone County Court* (1) an action of tort had been remitted under s. 10 of the County Courts Act, 1867, without an affidavit of the plaintiff's want of means. The county court judge (Judge Stonor) declined to try the action on the ground that the order had been irregularly obtained and was invalid. He postponed the trial, and made a special return (setting out the facts) to a rule which had been obtained requiring him to shew cause why he should not hear the case. It was held by Day J. and A. L. Smith J. that the county court judge was quite right in the course which he had adopted, but A. L. Smith J. added: "It seems to me a great pity that the learned county court judge refused to try the case when both parties were before him with their witnesses, and desirous that the case should be determined by him." In the next case to which I will refer the county court judge, after raising the question of jurisdiction, did proceed to try the case, and on appeal it was said that in future a different course ought to be adopted: *Parsons* v. *Lakenheath School Board.* (1) It was an action brought in the superior Court and remitted for trial, apparently by consent of both parties, to the Brompton County Court. The question of jurisdiction was raised by the county court judge himself (Judge Stonor), but he nevertheless, having the parties before him, proceeded to hear and determine the case. An appeal was brought, and on such appeal the question of jurisdiction was raised, and it was determined that he had jurisdiction. In giving judgment Field J. said: "If it is a question which should ever arise again, the better course will be, for the purpose of testing the matter, for the county court judge to refuse to hear, and leave the parties to make an application for a mandamus, if it should be thought desirable and necessary to raise the point at the instance of the county court judge." This was the course followed in the next case, *Reg.* v. *Judge of City of London Court.* (2) After an action had been discontinued, a counterclaim was remitted for trial to the City of London Court, and the judge of that Court held that he had no jurisdiction to try it, and the rule to shew cause was discharged on the ground that the order remitting the action was made without jurisdiction.

---

(1) 50 L. T. 97.

The advantage of following the course which we now state to be the proper one will be that, if either party wishes to carry the case further on the question of jurisdiction, the Court will have before it the judge's reasons fully stated, shewing why in his opinion the order remitting the action does not give him jurisdiction to hear the case.

The order in the present case being valid in all respects and not indeed open to any question whatever as to jurisdiction, the duty of the county court judge was to have tried the action. Instead of doing so, he struck it out of his list. We are of opinion that in so doing he committed an error of

(1) *County Courts Chronicle,* June 1, 1889, p. 128.
(2) [1891] 2 Q. B. 71.

judgment, which has caused delay and expense to the suitors in his Court. In the affidavit in support of the rule, the judge was stated to have said: "If I have to try it, I will put it at the bottom of the list day after day and adjourn it until you are tired of it and the claim is swallowed up in costs." The judge, however, in his affidavit in answer states that it is not true that he said those words. Indeed, immediately afterwards he is reported as saying (in the same affidavit in support of the rule), "However, I am not going to do that." The judge further says in his affidavit: "What I did say was that I had been told that it was the practice of some of my colleagues to take that course, but that, as I did not approve of it, I thought the best way was to strike it out and so raise the question." The judge must have been misinformed as to the practice of some of his colleagues, as we cannot conceive that any county court judge should be so far forgetful of his position, his duties, and his obligations as ever to take such a course.

In the present case, there is a further affidavit by the county court judge which was not before the Divisional Court, in which he states that it appeared to him that there was a serious doubt whether upon the true construction of s. 65 there was any jurisdiction in the High Court to remit the case to the Manchester County Court, and he desired that the judgment of the High Court should be obtained on the matter, and that he took the course of declining to try the case, not with the intention of shewing any disrespect to the order of the High Court, but solely because it was, so far as he was aware, the only course open to him by which a decision of the High Court upon the question of jurisdiction could be obtained.

Although in our opinion there was really no question whatever of jurisdiction upon the order before him, or indeed anything which justified his declining to proceed with the hearing, we are willing and indeed glad to accept the judge's assurance that he did so without the slightest intention of contumacious disobedience of the order, and that he really failed to recognize the binding character of the order. In this respect the case differs from *Blades* v. *Lawrence*. (1)

---

(1) L. R. 9 Q. B. 374.

C. A.
1914

REX
v.
MELLOR.

In the result we are of opinion that the order of the Divisional Court for the judge to proceed to hear and determine the action must stand, but that the order was erroneous and made without jurisdiction in ordering the judge to pay the costs thrown away in the county court. The judge was not a party to that litigation, and the only costs in the discretion of the Divisional Court were the costs of the proceedings before it: *Churchward* v. *Coleman.* (1) This portion of the judgment of the Divisional Court cannot be sustained.

In our opinion the order of the Divisional Court should be varied by omitting from it the whole of the direction as to costs, beginning with the words "and it is further ordered." The rest of the order will remain and be affirmed.

There will be no order as to any costs of this appeal.

Order varied.

Solicitor for appellant: *Solicitor to the Treasury.*

Solicitors for plaintiff in action: *C. P. Fielder, Le Riche & Co., for Broadsmith & Son, Manchester.*

Solicitors for defendants in action: *Kingsley Wood & Co.*

W. F. B.

---

(1) L. R. 2 Q. B. 18.

[IN THE COURT OF APPEAL.]

C. A.
1914
Feb. 13, 16, 20.

ASSOCIATED NEWSPAPERS, LIMITED AND OTHERS, APPELLANTS *v.* MAYOR, ALDERMEN, AND COMMONS OF THE CITY OF LONDON, RESPONDENTS.

Rates—Exemption—City of London—Land reclaimed from the Thames—"Free from all taxes and assessments whatsoever"—Poor Rate—County Rate—Education Expenses—Equalisation Charge—7 Geo. 3, *c.* 37, *s.* 51—*County Rates Act,* 1852 (15 *&* 16 *Vict. c.* 81), *s.* 26—*Local Government Act,* 1888 (51 *&* 52 *Vict. c.* 41), *s.* 68—*London* (*Equalisation of Rates*) *Act,* 1894 (57 *&* 58 *Vict. c.* 53), *s.* 1, *sub-s.* 5 (*b*)—*Education Act,* 1902 (2 *Edw.* 7, *c.* 42), *s.* 18.

By s. 51 of 7 Geo. 3, c. 37, it was provided that certain lands reclaimed from the river Thames should vest in the adjoining owners "free from all taxes and assessments whatsoever."

The education expenses under the Education Act, 1902, the equalisation charge under s. 1, sub-s. 5 (*b*), of the London (Equalisation of Rates) Act, 1894, and the sums required to be raised by the county council under s. 68, sub-ss. 4 and 5, of the Local Government Act, 1888, are payable by county contributions which are levied by means of county rates made according to the provisions of s. 26 of the County Rates Act, 1852. By that section precepts for the levy of the money required to be raised by a county rate are directed by county councils to the guardians of the poor, who raise the money required by such precepts in like manner as the money required by the guardians for the relief of the poor, that is to say, by contribution orders addressed to the overseers of parishes who pay the money out of the poor rates collected by them.

Precepts or contribution orders were addressed by the London County Council to the respondents, who were the overseers of the parish of the city of London within which the reclaimed lands were situate, for the payment of the sums required to be levied in the parish of the city of London for the above-mentioned purposes, and the respondents paid such sums out of the proceeds of the poor rate levied by them in the parish, and the appellants, as the occupiers of hereditaments within the reclaimed area, were rated to so much of the poor rate as included the sums of money required to meet the precepts of the London County Council:—

Held, that as the exemption in s. 51 of 7 Geo. 3, c. 37, applied to then existing taxes and assessments or others substituted for them: *Sion College* v. *London Corporation* [1901] 1 K. B. 617; and as it included the poor rate; *Rex* v. *London Gas Light Co.* (1828) 8 B. & C. 54; it included every part of the poor rate, which was one indivisible rate, and the exemption therefore covered the education charge, the equalisation charge, and the other sums above mentioned, which were charged upon and made payable out of the poor rate; and that the appellants were therefore exempt.

Decision of the Divisional Court [1913] 2 K. B. 281 reversed.

Quære, whether *Sion College* v. *London Corporation* [1901] 1 K. B. 617 is still a binding authority having regard to the observations of Lord Davey in *London Corporation* v. *Netherlands Steamboat Co.* [1906] A. C. 263, at p. 271.

Appeal from an order of a Divisional Court upon a case stated under s. 11 of the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45); reported [1913] 2 K. B. 281.

The appellants gave notice of appeal to the Quarter Sessions for the city of London against a poor rate for the parish of the city of London made by the respondents on April 6, 1911. The following case was thereupon stated.

1. In a poor rate made by the respondents as overseers of the parish of the city of London on April 6, 1911, the several appellants were rated thereto in respect of the several hereditaments owned or occupied by them. The appellants jointly gave notice of appeal against the rate.

2. The facts relating to the several hereditaments in question were the same in each case, and one particular hereditament was taken as a specimen case, it being agreed that the decision of the Court on the questions raised should be applicable to all the appellants and all the hereditaments in question.

3. The particular hereditament is situate in an area of land reclaimed from the river Thames under the powers granted for that purpose by the statute 7 Geo. 3, c. 37.

4. Under the powers granted by that Act the ground and soil now forming the reclaimed area were enclosed and embanked, as to part at the expense of the Mayor, Aldermen, and Commons of the City of London in Common Council assembled, and as to the remainder at the expense of the owners and proprietors of the several wharfs or grounds abutting on the north side of the river Thames within the limits specified in the Act.

5. By the same Act the whole of the reclaimed area was vested in the owner or owners, proprietor or proprietors, of the then existing wharfs or grounds adjoining thereto according to

their respective interests "free from all taxes and assessments whatsoever."

6. The hereditament is a portion of the ground so vested by the Act, and the owners thereof are the successors in title of the persons in whom that portion was originally vested.

7. By the City of London (Union of Parishes) Act, 1907 (7 Edw. 7, c. cxl.), s. 5, the reclaimed area became (together with other areas) a part of the parish of the city of London which was formed by that Act. By s. 11 of that Act the respondents are the overseers of the parish of the city of London.

8. The powers of the overseers of the parish of the city of London to levy a poor rate are derived from the Poor Relief Act, 1601 (43 Eliz. c. 2), and subsequent statutes.

9. By virtue of the Education Act, 1902 (2 Edw. 7, c. 42), read with the Education (London) Act, 1903 (3 Edw. 7, c. 24), the London County Council are the local education authority for London. By s. 18 of the Education Act, 1902, the expenses under that Act of the council of a county shall (so far as not otherwise provided for) be defrayed out of the county fund.

10. By the London (Equalisation of Rates) Act, 1894 (57 & 58 Vict. c. 53), s. 1, sub-s. 5 (*b*), where the contribution due from a parish under that Act exceeds the grant due to the parish the London County Council shall for the purpose of meeting the excess levy on the parish a county contribution (called the equalisation charge) as a separate item of the county rate.

11. By virtue of the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 68, the London County Council levy county contributions in order to meet any deficiency caused by the moneys standing to the general county account being insufficient to meet the expenditure for general county purposes, and in order to meet any deficiency caused by the moneys standing to any special county account being insufficient to meet the expenditure for any of the special county purposes chargeable to that account. Where any moneys required by the London County Council for either of the purposes specified in paragraphs 9 or 10 hereof, or for any other purposes for which the London County Council are by law entitled to levy money out of rates, are in law leviable

such moneys are levied by means of such county contributions aforesaid.

12. Such county contributions are levied by the county councils by means of county rates made according to the provisions of the County Rates Act, 1852 (15 & 16 Vict. c. 81). By s. 26 of that Act read together with s. 3, sub-s. (i.), of the Local Government Act, 1888, precepts for the levy of the money required to be raised by a county rate are directed by county councils to guardians of the poor, who raise the money required by such precepts to be paid in like manner as the money required by such guardians for the relief of the poor. By ss. 40 and 41 of the Local Government Act, 1888, the county of London was created out of parts of the counties of Middlesex, Surrey, and Kent, as a separate county, and that county together with the county of the city of London (which was left to continue as a separate county) was made an administrative county for the purposes of that Act by the name of the Administrative County of London. By the same two sections the provisions of the Act were adapted to the special circumstances of the three last mentioned counties.

13. By virtue of the Poor Law Board's General Order dated April 22, 1842 (1), and made under the powers of the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 15, and by virtue of the Poor Law Board's Consolidated Order Amendment Order dated February 26, 1866, and made under the powers of the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 11, the money required by guardians for the relief of the poor is raised by contribution orders addressed to the overseers of parishes, who are to pay such money out of the poor rates collected by them. The City of London Union is a poor law union for the purposes of the Poor Law Acts and consists of one parish only, namely, the parish of the city of London created by the City of London (Union of Parishes) Act, 1907, mentioned above. There is still a board of guardians for the City of London Union. A scheme has been duly made under s. 5, sub-s. 4, of the said Act of 1907.

---

(1) See Macmorran's Poor Law Orders, 2nd ed., vol. i., pp. 8, 72, 386—388, and a form of contribution order is given on p. 392.

14. By s. 12 of the City of London (Union of Parishes) Act, 1907, "every precept issued by any authority for the purpose of obtaining money which is ultimately to be raised out of a rate within the parish of the city of London . . . . shall be sent to the Common Council . . . . 'Precept' in this section includes any order, certificate, warrant or other document of a like character."

15. By virtue of the enactments and orders above specified, or some of them, precepts or contribution orders are addressed by the London County Council to the respondents for the payment of any sums required by the London County Council—as the authority for the Administrative County of London—to be levied in the parish of the city of London for any of the purposes specified in paragraphs 9, 10, and 11 hereof or other purposes authorized by law. The respondents pay any sums so required to be paid out of the proceeds of the poor rate levied by them on the parish of the city of London.

16. The Corporation of London levy a distinct county rate for the city of London for the purpose of raising moneys to meet expenditure which can by law be met out of a county rate. The county rate is levied in accordance with the provisions of the County Rates Act, 1852.

17. The poor rate made on April 6, 1911, was made at the rate of 2*s.* 6*d.* in the pound and included the sums of money required to meet the precepts of the London County Council. In that rate the following amounts in the pound were included for the purposes aforesaid, namely :—

	d.
Education	11$\frac{2}{16}$ in the pound.
Other purposes of the London County Council . . .	7$\frac{12}{16}$,, ,,
Equalisation charge . . .	3 ,, ,,
Total to meet London County Council's precepts . .	1*s.* 9$\frac{14}{16}$*d.* ,, ,,

The hereditament was assessed only to that part of the poor rate which was required to raise the sums needed to meet the precepts of the London County Council. The amount assessed in respect thereof was *55l.* 1*s.* $0\frac{1}{2}$*d.*, being 1*s.* $9\frac{14}{16}$*d.* in the pound of the rateable value of the hereditament.

18. After the passing of the City of London Sewers Act, 1897 (60 & 61 Vict. c. cxxxiii.), and before the passing of the Education (London) Act, 1903, the amount required to be raised for the purposes of elementary education was raised as part of the consolidated rate levied under the City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.). In the case of *Sion College* v. *London Corporation* (1) it was decided on a special case stated on an appeal to quarter sessions that land within the reclaimed area in question was liable to pay a certain consolidated rate levied under the said provisions (including therein an amount required for the purposes of education). At the time of the passing of the statute 7 Geo. 3, c. 37, there was no rate, tax, or assessment for the purposes of education or including such purposes. After the passing of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), and before the passing of the City of London Sewers Act, 1897, the expenses for elementary education raised in the city of London were paid by the Commissioners of Sewers out of the consolidated rate on the precept of the London School Board addressed to them.

19. The appellants contended :—

(1.) That by virtue of the statute of 7 Geo. 3, c. 37, they were not rateable to the poor rate or any portion thereof in respect of the hereditament;

(2.) That being by virtue of the statute as owners or occupiers of the hereditament free from all taxes and assessments whatsoever, they were not liable to pay the poor rate or any portion thereof;

(3.) That by the same statute they were not rateable to a rate made for other purposes and chargeable on the poor rate, and that the exemption conferred upon them was not affected by any subsequent enactment;

(4.) That they were not liable to be assessed to such portion of the poor rate appealed against as was made for the purpose of raising sums required by the London County Council, such sums being only leviable by means of the poor rate.

---

(1) [1900] 2 Q. B. 581; [1901] 1 K. B. 617.

20. The respondents contended with reference to the matters in dispute in this appeal :—

(1.) That the statute 7 Geo. 3, c. 37, only exempted the properties in question from rates and assessments made under enactments then in force and not since repealed, and did not extend to rates made under later enactments;

(2.) That moneys raised for the purpose of education were imposed by legislation subsequent to the statute of 7 Geo. 3, c. 37, and that the exemption conferred by that statute did not apply thereto;

(3.) That the occupiers of lands within the reclaimed area were not exempted by the statute of 7 Geo. 3, c. 37, from contributing to any of the purposes included in the rate for which the London County Council's precepts were or could be issued;

(4.) That the Local Government Act, 1888, had created a wholly new entity, namely, the Administrative County of London, with a new governing body and new rating powers and new functions :

(5.) That the hereditaments within the reclaimed area were not exempt from the poor rate as now leviable in the parish of the city of London.

21. The question for the opinion of the Court was whether the appellants were liable to pay the sums assessed upon them in respect of the poor rate or any of them.

22. If the Court should be of opinion that the appellants were liable to pay the sums assessed upon them, the appeal was to be dismissed with costs and the rate was to be confirmed. If the Court should be of opinion that the appellants were not liable to pay the sums assessed upon them, the appeal was to be allowed with costs. If the Court should be of opinion that the appellants were liable to pay certain only of the sums, then the Court was requested to make such order as to costs as should seem fit. It was agreed that the rate should be amended as might be required by the decision of the Court, and that the Court might make such further or other order as the Court should think fit.

The Divisional Court (Channell, Bray, and Lord Coleridge JJ.) held that as the charges in question were new charges created since the passing of 7 Geo. 3, c. 37, the decision of the Court of Appeal in *Sion College* v. *London Corporation* (1) applied, and the appellants were not exempt from payment of the said sums. (2) The appellants appealed to the Court of Appeal.

Macmorran, K.C., and *Konstam*, for the appellants. By s. 51 of 7 Geo. 3, c. 37, the land which was reclaimed from the Thames was vested in the owners of the adjoining wharfs or grounds "free from all taxes and assessments whatsoever." This enactment exempts those hereditaments from the payment of the poor rate: *Rex* v. *London Gas Light Co.* (3) The exemption includes whatever is now charged upon and made part of the poor rate. The three constituent parts of the rate which are objected to, namely, the education charge, the equalization charge, and the charge for the other purposes of the county council, are levied by the machinery of the County Rates Act, 1852; that is to say, the county council (formerly the justices in quarter sessions) make an estimate of their money requirements, and direct a county rate to be made, and precepts for the levy of the money required to be raised are issued to the guardians of each union, stating the sum charged upon each parish within the union, and the guardians raise the money required in like manner as the money required by them for the relief of the poor, in other words, by contribution orders directed to the overseers of the poor for each parish who pay the money out of the rate for the relief of the poor. Thus the source from which the money comes is the poor rate. The county rate is charged upon and made part of the poor rate. The overseers levy the poor rate under the Poor Relief Act, 1601, and subsequent Acts. It is one rate though in process of time charges in respect of various matters have been imposed upon it. Before the passing of the statute 7 Geo. 3, c. 37, the poor rate had ceased to be levied exclusively for the relief of the poor. By 12 Geo. 2, c. 29, a county rate for the repair of bridges, the building and repair of gaols, and the maintenance of rogues, vagabonds, and sturdy beggars in houses of correction, was charged upon and made payable out of the poor rate. As regards taxes other than the poor rate it has been held that the statute 7 Geo. 3, c. 37, exempts hereditaments built on the land reclaimed from the Thames from land tax, though imposed in general terms by an Act passed after 7 Geo. 3, c. 37: *Williams* v. *Pritchard* (1); and from paving and lighting rates: *Eddington* v. *Borman* (2); but not from the house and window duty, which was not a local tax: *Perchard* v. *Heywood*. (3) The County Rates Act, 1852, imposes no new taxation. It only deals with the machinery for collecting the county rate. The Legislature took advantage, for the purposes of the county rate, of the existing machinery for collecting money required for the relief of the poor by means of the poor rate, and the overseers levy the amount required for the county rate as part of the poor rate. The poor rate is one indivisible rate. The borough rate and the county rate are part of the poor rate so as to require the promoters of an undertaking to make good, under s. 133 of the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), the deficiency in the assessment for poor rate arising from their being in possession of lands liable to be assessed thereto: *Farmer* v. *London and North Western Ry. Co.* (4) As Wills J. said in that case (5), the effect of s. 26 of the County Rates Act, 1852, is to make the county rate "part of the poor rate." In *Islington Corporation* v. *London School Board* (6) it was held on the other hand that the general rate under s. 10, sub-s. 2, of the London Government Act, 1899 (62 & 63 Vict. c. 14), is a distinct rate, subsisting side by side with the poor rate, though levied as if it were the poor rate. In that case Vaughan Williams L.J. said that the ground of the decision in *Farmer* v. *London and North Western Ry. Co.* (4) was that the borough rate and the county rate were really poor rates, that is to say, were either poor rate or charged on poor rate. Education expenses are payable out of the poor rate. They are therefore part of the poor rate. A person whose qualification for the franchise depends upon his having paid poor rate is not entitled to have his name on the list of

---

(1) [1901] 1 K. B. 617.

(2) [1913] 2 K. B. 281.

(3) (1828) 8 B. & C. 54.

---

(1) (1790) 4 T. R. 2.

(2) (1790) 4 T. R. 4.

(3) (1800) 8 T. R. 468.

(4) (1888) 20 Q. B. D. 788.

(5) Ibid. at p. 793.

(6) [1902] 2 K. B. 701; [1903] 2 K. B. 354.

C. A.
1914

ASSOCIATED NEWSPAPERS, LIMITED v. CITY OF LONDON CORPORATION.

voters unless he has paid the whole of the poor rate, including the education charge: *Ash* v. *Nicholl.* (1) As Kennedy J. said (2), " the poor rate is one indivisible rate, and it is impossible to say that the appellants in the two cases before us had paid the poor rate when in fact they had only paid part of the amount demanded of them." Therefore the poor rate is one rate, though it is made for a variety of purposes. It includes everything which is charged upon and made part of the poor rate. In s. 20 of the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), poor rate is defined as meaning " the assessment for the relief of the poor and for the other purposes chargeable thereon according to law, and in the metropolis shall extend to every rate made by the overseers, and chargeable upon the same property as the poor rate." The decision in *Sion College* v. *London Corporation* (3) related to the consolidated rate made under the City of London Sewers Act, 1848 (11 & 12 Vict. c. clxiii.), which was levied as a separate rate. In the Divisional Court the ground of the decision was that upon the true construction of the Act of 1848 an intention was shewn to charge the hereditaments with the rate the subject of that Act and to override the exemption conferred by the Act of 7 Geo. 3, c. 37. In the Court of Appeal the ground of the decision was quite different, namely, that the Act of 7 Geo. 3, c. 37, only conferred exemption from then existing taxes and assessments or others substituted for them. The poor rate is an old rate which was in existence when the Act of 7 Geo. 3, c. 37, was passed. Further, if the test adopted by the Divisional Court in that case is applied, the provisions of that Act were the result of a bargain for good consideration between the Corporation of the City of London and the owners of the reclaimed land : *Perchard* v. *Heywood* (4); *Rex* v. *London Gas Light Co.* (5); and the Court will not be astute to take away an exemption founded upon a bargain for good consideration. The express statutory exemption cannot be taken away by general words in a subsequent Act : *London Corporation*

---

(1) [1905] 1 K. B. 139.

(2) Ibid. at p. 151.

(3) [1900] 2 Q. B. 581; [1901] 1 K. B. 617.

(4) 8 T. R. at p. 472.

(5) 8 B. & C. at p. 60.

v. *Netherlands Steamboat Co.* (1) The decision of the Divisional Court was therefore wrong. [*Whitehaven Harbour Commissioners* v. *Whitehaven Union* (2) was also referred to.]

Ryde, K.C., and *Boydell Houghton*, for the respondents. There is nothing in the Act of 7 Geo. 3, c. 37, to shew that the exemption from "all taxes and assessments whatsoever" conferred by s. 51 of that Act was the result of a bargain between the Corporation and the owners of the adjoining land under which the latter should embank and reclaim the land from the Thames and that in consideration thereof the reclaimed land should vest in them free from all taxes and assessments whatsoever. *Reg.* v. *Musson* (3) shews that prima facie the boundary of a parish adjoining the sea is at high water mark, though it may be proved to extend to low water mark. The same principle applies to a tidal river: *McCannon* v. *Sinclair* (4); *Bridgwater Trustees* v. *Bootle-cum-Linacre.* (5) Therefore the Act as it stands is consistent with the view that the exemption is based upon the ground that the unreclaimed land was extra-parochial. If that is so, the difficulty of holding that general words in a later Act has taken away the exemption given by way of bargain disappears. Sect. 27 of the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), has now fixed the boundary of the parish at low water mark or at the middle of the river, as the case may be. However that may be, it is sufficient for the respondents to rely upon the decision of the Court of Appeal in *Sion College* v. *London Corporation.* (6)

The County Rates Act, 1852, deals with the machinery for collecting the county rate. By s. 2 the justices in quarter sessions were to appoint a committee for preparing a basis or standard for fair and equal county rates, such basis or standard to be founded and prepared rateably and equally according to the full annual value of the property rateable to the relief of the poor in every parish or place, whether parochial or extra-parochial, or which in any place not maintaining its own poor would be liable to be rated for the relief of the poor if such last-mentioned place were a parish. By s. 21 the justices in quarter sessions were to make a fair and equal county rate, and for that purpose to assess and tax every parish, township, and other place, whether parochial or extra-parochial. By virtue of ss. 26 and 30 the county rate is collected in the same way as the poor rate. The county rate now includes the education rate. Under s. 4 and Sched. I. of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), the education rate in the city of London was paid out of the consolidated rate. Under the decision of this Court in *Sion College* v. *London Corporation* (1) the appellants were not exempt from the payment of that rate. By s. 18 of the Education Act, 1902 (2 Edw. 7, c. 42), the expenses of a council under that Act for education purposes are payable, in the case of a county council, out of the county fund, and by the Education (London) Act, 1903 (3 Edw. 7, c. 24), the Act of 1902 was extended to London. The education charge is now collected by the machinery of the County Rates Act, 1852. It cannot be assumed that the Legislature, in making this alteration, intended to alter the incidence of taxation. The education rate is a new rate which was not in existence at the time of the passing of the Act of 7 Geo. 3, c. 37, and the exemption in s. 51 of that Act does not apply. The name given to the rate cannot alter the substance. The fact that in the city of London the education rate is levied by the machinery of the poor rate cannot make it an existing rate when 7 Geo. 3, c. 37, was passed. So also the rate under the London (Equalisation of Rates) Act, 1894, is a new rate, though it comes out of the county rate as a matter of machinery; and the sums required for the "other purposes of the London County Council" are also new. The decision therefore in *Sion College* v. *London Corporation* (1) applies to all three items.

---

(1) [1906] A. C. 263, at p. 271.

(2) (1905) 94 L. T. 504.

(3) (1858) 8 E. & B. 900.

(4) (1859) 2 E. & E. 53.

(5) (1866) L. R. 2 Q. B. 4.

(6) [1901] 1 K. B. 617.

With regard to the authorities cited, the decision in *Eddington* v. *Borman* (2) proceeded upon the ground that the assessments in question were to be made upon occupiers of land or houses who were liable to be rated towards the relief of the poor. Therefore the rate there in question was imposed upon persons who were liable to the poor rate. In *Rex* v. *London Gas*

(1) [1901] 1 K. B. 617.

(2) 4 T. R. 4.

Light Co. (1) the rate was for the relief of the poor, and the main question was whether certain local Acts passed after 7 Geo. 3, c. 37, were inconsistent with the exemption claimed; in other words, whether those later statutes had imposed the liability. In *Farmer* v. *London and North Western Ry. Co.* (2) the question turned upon the meaning to be given to "poor's rate" in s. 133 of the Lands Clauses Act, 1845, so as to see whether that expression, having regard to the object of the enactment, included rates which were raised as poor rate. Moreover, it is somewhat difficult to reconcile the decision in that case with the subsequent decision of this Court in *Islington Corporation* v. *London School Board.* (3) In this latter case it was held that the general rate and the poor rate, made and levied under s. 10, sub-s. 2, of the London Government Act, 1899, as one rate under the name of the general rate, which was made and levied as if it were the poor rate, were still in reality, though not in name, two rates. The reasoning of the Court shews that, in their opinion, the machinery for collecting the rates was altered, but not the rates themselves. In the same way in the present case only the machinery for collecting the rates is altered, and not the rates themselves. In *Ash* v. *Nicholl* (4) different considerations arose. That was a case dealing with the right of a person to be on the list of voters, and in that case a wide interpretation was given to the words "poor rate," chiefly owing to the definition in s. 20 of the Poor Rate Assessment and Collection Act, 1869. The decision of the Divisional Court is therefore right.

Macmorran, K.C., in reply.

Cur. adv. vult.

Feb. 20. The judgment of the COURT (Vaughan Williams, Kennedy, and Swinfen Eady L.JJ.) was read by

SWINFEN EADY L J. The question raised by this case, which has been stated for the opinion of the Court, is whether the appellants are rateable to the poor rate, or any portion thereof, in respect of certain shops and offices included within the area of land reclaimed under 7 Geo. 3, c. 37.

---

(1) 8 B. & C. 54.

(2) 20 Q. B. D. 788.

(3) [1902] 2 K. B. 701; [1903 2 K. B. 354.

(4) [1905] 1 K. B. 139.

A poor rate of 2*s*. 6*d*. in the pound was made for the parish of the city of London on April 6, 1911, and the appellants have been assessed to part of it, namely, 1*s*. 9$\frac{14}{16}$*d*. in the pound, being such a fraction of the 2*s*. 6*d*. as represents moneys required to defray the equalisation charge, the charges for education, and for other purposes of the London County Council. The Divisional Court held that the Associated Newspapers, Limited, and the other appellants were liable to be rated to the extent of this 1*s*. 9$\frac{14}{16}$*d*., and that the exemption of their hereditaments did not extend to this portion of the poor rate. From this decision the present appeal is brought.

By s. 51 of the statute, 7 Geo. 3, c. 37, it was provided that certain lands enclosed, embanked, and reclaimed from the river Thames should vest in the adjoining owners "free from all taxes and assessments whatsoever." The appellants contend that, by virtue of this enactment, they are free from and not liable to be assessed to the poor rate in respect of the reclaimed lands, although the poor rate may be larger in amount than when that Act was passed, and although additional sums may be charged upon or payable out of it for other purposes than those to which the poor rate was applicable in 1766. It was decided by the Court of King's Bench in 1828, in *Rex* v. *London Gas Light Co.*(1), that the provision in the Act of 7 Geo. 3 exempted the occupiers of the reclaimed lands from poor rate. This followed the earlier case of *Williams* v. *Pritchard* (2) in 1790, in which it was decided that the occupiers of the same lands were exempted from land tax imposed by 27 Geo. 3. A subsequent case of *Perchard* v. *Heywood* (3) in 1800 determined that the occupiers were liable for the house and window duties, notwithstanding the exemption, and Lord Kenyon C.J. stated the grounds of the decision, and pointed out why the occupiers, who had not been held liable for land tax, were liable for house and window tax. The contention of the defendant's counsel in the last-mentioned case had been as follows: That the clause giving exemption from taxes and assessments was only a private contract between the Corporation and the owners of the ground within the limits mentioned in the Act, whereby, if the latter chose to embank the river at their own expense, the Corporation consented that they should be free from all taxes and assessments whatsoever; that must necessarily mean such taxes and assessments as were of a local nature, and of which, therefore, it was competent to the rest of the inhabitants within the City to agree to take the whole burden upon themselves, instead of calling on these parties to bear their share of it. Of this nature was the land tax, a certain quota of which was to be raised within the City. The sum to be raised upon each district being certain, it was immaterial to the public by whom in particular it was paid; and it was competent to the City to agree with the owners of this land that they should be exempted from contributing. This argument Lord Kenyon adopted, saying at p. 472: "This Act of Parliament is (as the defendant's counsel has contended) to be considered as a contract between the respective parties, notwithstanding it is (as many other Acts of the same kind are) declared to be a public Act; for it was brought in on the petition of the Corporation of London. When the Act passed, certain improvements of the property on the banks of the Thames were in view; and in order to encourage the scheme, the lands to be improved were to be exempted from certain local taxes; of this nature was the land tax; for that Act imposes a general burden which is to be raised on the whole City, and therefore, inter se, the Corporation might agree that the owners of this property should be exempted from bearing their share of it; but it was not the intention of the Legislature to extend the exemptions further." Again in *Rex* v. *London Gas Light Co.* (1) Lord Tenterden C.J. adopted the same view, in holding that the exemption extended to poor rates. He said at p. 60: "It has already been decided that it is exempt from the land tax, and I know not upon what principle that decision could proceed, if it be not exempt from poor rates also. It is said that an aggregate sum was imposed upon the district for land tax, which was afterwards sub-divided amongst the individuals having property there; and that it was immaterial to Government how the division was made, provided

---

(1) 8 B. & C. 54.

(2) 4 T. R. 2.

(3) 8 T. R. 468.

(1) 8 B. & C. 54.

C. A.
1914

ASSOCIATED NEWSPAPERS, LIMITED
v.
CITY OF LONDON CORPORATION.

the whole sum was raised. It was also said, that the Act of Parliament being in its nature private must be considered as a bargain between those who were parties to it, and that the City at large might in expectation of benefit from the embankment have consented that the land should not bear any part of the land tax. But that argument is equally applicable to the present case. The poor may be substituted for the Government; the whole sum to be raised for them is first calculated; and the amount to be raised remains the same whatever be the property in the district liable to contribute. Again, the embankment might be beneficial in a peculiar manner to the parish as well as to the City at large, and the inhabitants of the parish might, on that account, agree that it should be exempt from poor rates." And again he said at p. 61: "We were then pressed with the case of *Perchard* v. *Heywood* (1), where it was held that houses built on this land were liable to house and window tax. But that was a very different case. The object of the tax was to raise as large a sum as possible for the use of the public, and the amount raised would have been lessened had any houses been exempted, whereas the amount raised for land tax or poor rate would not; and I think that the decision as to the land tax ought to guide our judgment on this occasion."

It must be remembered that at the time of the passing of the Act 7 Geo. 3, and also when in 1828 the Court of King's Bench held that the occupiers of the reclaimed lands were exempted from poor rate, this rate was applicable to other purposes than the relief of the poor. By the statute 12 Geo. 2, c. 29, intituled "An Act for the more easy assessing, collecting, and levying of county rates," power was given to the justices of the peace in quarter sessions to make one general rate or assessment for all the purposes of the various recited Acts, and the overseers of the poor were required to pay the amount of this county rate out of the poor rate. The various recited purposes included the repairing of bridges and highways, the building and repair of gaols, providing and maintaining houses of correction to provide for the due execution of the laws against rogues, vagabonds, and sturdy beggars, for the relief of poor prisoners in the King's

---

(1) 8 T. R. 468.

Bench and Marshalsea prisons, and for other purposes. In the course of time the poor rate has come to be relieved from some of these burdens; but, on the other hand, new charges for education and other purposes are imposed upon or payable out of it. By the County Rates Act, 1852, an Act consolidating and amending the statutes relating to the assessing and collection of county rates, parts of the 12 Geo. 2, c. 29, were repealed, and it is provided by s. 26 that the justices of the peace shall send precepts to the guardians of the poor for the payment of the county rates, and the guardians are required to pay the amount out of their funds, i.e., the poor rate or money collected for the relief of the poor. This statute provides machinery, and does not impose any new burden or any new taxation.

Again, it was held in *Farmer* v. *London and North Western Ry. Co.* (1) that where promoters of an undertaking are liable to make good the deficiency in the assessment for poor rate, arising from their being in possession of lands liable to be assessed thereto, the deficiency in the poor rate which they are so liable to make good includes any deficiency in amounts raised for "borough rate" and "county rate" as well as any deficiency for poor law purposes properly so called. Their liability is to make good the deficiency in the poor rate, and they are liable to make good such deficiency to whatever legal purposes the poor rate may be applicable. The "borough rate" and "county rate" are charged on and payable out of the poor rate. They constitute objects to which the poor rate may and must, in part, be lawfully applied.

The converse of the proposition established by this case is equally true, that if an occupier is exempted from the poor rate, the exemption ought to extend to and include those rates which are not levied separately, but only go to swell the amount of the rate levied for the relief of the poor.

Whether the case of *Sion College* v. *London Corporation* (2) is still a binding authority may be open to doubt, having regard to the observations of Lord Davey in *London Corporation* v. *Netherlands Steamboat Co.* (3), but, in any case, the *Sion College Case* (2) is readily distinguishable from the present upon the

(1) 20 Q. B. D. 788.

(2) [1900] 2 Q. B. 581; [1901] 1 K. B. 617.

(3) [1906] A. C. 263, at p. 271.

ground that the Court there proceeded upon the footing that the consolidated rate which was levied separately was substantially a new assessment, and, therefore, not within the exception which it was said applied only to then existing taxes and assessments or others substituted for them, whereas the poor rate has been with us since the reign of Elizabeth, although in course of time fresh expenses have been directed to be paid out of it.

The ground of the decision in the other case referred to, namely, *Islington Corporation* v. *London School Board* (1), was that the London Government Act, 1899, left the two rates, "general rate" and "poor rate," co-existing side by side; no provision was made for discontinuing either of those rates, although the sewers rate and lighting rate were discontinued as separate rates. The general rate was not charged on the poor rate. It is no authority for the proposition that a rate may be apportioned according to the purposes for which the money is raised. In our opinion there is no ground upon which the appellants can properly be charged with a fractional part of the poor rate. The poor rate is one indivisible rate. It was so held in *Ash* v. *Nicholl.* (2) By s. 20 of the Poor Rate Assessment and Collection Act, 1869, "poor rate" is said to mean "the assessment for the relief of the poor, and for the other purposes chargeable thereon according to law." The rating authority has no right to demand and to give a receipt for a fractional part of the rate as applicable only to specified purposes, nor has the ratepayer any authority to appropriate any payment of part of the rate to any particular purpose. Although the demand note specifies the various purposes for which the rate is made, and the amounts required for the several purposes, the rate, nevertheless, remains one indivisible rate.

In our judgment the appeal should be allowed upon the ground that the statute of 7 Geo. 3, c. 37, exempts the appellants in respect of the premises in question from being liable to be assessed to the poor rate or any part of it.

Appeal allowed.

Solicitor for appellants: *William E. Hart.*

Solicitor for respondents: *Sir Homewood Crawford.*

(1) [1902] 2 K. B. 701; [1903] 2 K. B. 354. (2) [1905] 1 K. B. 139.

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.
1914
March 6.

NIGHTINGALE AND OTHERS *v.* PARSONS.

Principal and Agent—Commission—House Agent—Lease of House—Subsequent Sale to Tenant—"Efficient cause of sale."

The test stated by Collins M.R. in *Millar* v. *Radford* (1903) 19 Times L. R. 575, as to whether a house agent, who is employed to let or sell a house, is entitled to be paid commission on the introduction of a person who subsequently becomes the tenant or the purchaser, as the case may be, namely, whether "the introduction was an efficient cause in bringing about the letting or the sale," and not merely a causa sine qua non, approved and followed.

In 1908 the plaintiff, who was a house agent, was employed by the defendant to find a tenant for a house at a rent of 120*l.* a year or a purchaser for 2500*l.* The plaintiff found a tenant who took the house for a term of three years with the option of continuing the tenancy for five or seven years at the rent of 110*l.* a year, and he was paid commission on the letting. At the end of the three years the tenant, as a condition of his continuing the tenancy for a further term, required the defendant to build an addition to the house. The defendant refused to do so, and thereupon the question of purchasing the house arose, and the defendant agreed to sell it to the tenant's wife for 1900*l.* The plaintiff, after the original letting, had nothing to do with the negotiations which led up to the sale. The plaintiff sued the defendant in the county court to recover commission on the sale. The county court judge found that, though the plaintiff introduced the property to the tenant and his wife, that introduction was not the effective cause of the subsequent sale, and he gave judgment for the defendant:—

Held, that the county court judge had applied the proper test, and had found against the plaintiff's claim upon evidence which entitled him so to find, and that his decision must be affirmed.

APPEAL from the judgment of a Divisional Court (Ridley and Avory JJ.) ordering a new trial of an action tried in the county court of Surrey holden at Kingston.

In September, 1908, the defendant gave instructions to one Terry, who then carried on business as a house agent at Surbiton, to obtain a tenant for the defendant's house at a rent of 120*l.* a year or a purchaser for 2500*l.* Ultimately Terry found a tenant, a Mr. Sounes, who took the house for a term of three years, with the option to continue the tenancy for five or seven years, at a rent of 110*l.* Terry was paid commission on the basis of the house being let for three years, it being understood that if the tenant continued the tenancy for five or seven years he was to be paid a further proportionate commission. At the end of the three years the tenant, Mr. Sounes, required the defendant as a condition of his continuing the tenancy of the house for a further term to build a new wing to it. The defendant declined to do this, and thereupon the question of purchasing the house arose, and, as the defendant was anxious that the house should not be thrown upon his hands, he agreed to sell it to Mrs. Sounes, the tenant's wife, for 1900*l.*, and Mrs. Sounes became the purchaser.

It appeared that Terry sold his business to one Thompson, but did not assign his book debts or other choses in action. Thompson before action brought sold the business to Nightingale and Phillips, who continued to carry it on. An action was brought in the Kingston County Court to recover commission on the sale, and in order to avoid any question of parties all the above were joined as plaintiffs. (1)

Terry in his cross-examination said that he succeeded in letting the house but failed to sell, and that the matter was closed so far as he was concerned; that he did not agree that his authority was closed, and that there was a custom in such a case to pay commission on the sale. The defendant in his evidence said that after the original letting he paid the commission thereon, and considered the matter closed and never had any communication with Terry since; and that Terry had nothing to do with the sale.

The county court judge in giving judgment said that there was nothing to shew that there was any stipulation on the part of the plaintiff Terry that, if any tenant whom he might find subsequently purchased, he was to receive commission on the sale; that the plaintiff had nothing to do with the negotiations which led up to the sale, the sale for 1900*l.* being due to an arrangement arrived at between the defendant and Mr. Sounes;

---

(1) The county court judge dealt with the case upon the footing that Terry alone was the proper plaintiff and that the other plaintiffs might be left out of consideration, and this was the way in which the case was dealt with on the appeal.

and that, "though the plaintiff introduced the property to Mr. and Mrs. Sounes, that introduction was not, in my view, the effective cause of the subsequent sale." He accordingly gave judgment for the defendant.

The Divisional Court ordered a new trial upon the ground that the county court judge had misdirected himself in not sufficiently taking into consideration the question whether a continuous retainer of the plaintiff Terry should be implied from the evidence. The defendant by leave appealed.

Compston, K.C., and *Merlin*, for the defendant. The county court judge applied the proper test, namely, whether the introduction was "an efficient cause in bringing about the letting or the sale": *Millar* v. *Radford.* (1) The county court judge has found that the original introduction of the property to Mr. and Mrs. Sounes was not the effective cause of the subsequent sale, and there was ample evidence to support that finding. That finding, therefore, cannot be disturbed, and the order of the Divisional Court was wrong. [*Gillow & Co.* v. *Lord Aberdare* (2) was also referred to.]

J. I. Macpherson (*Colam, K.C.*, with him), for the plaintiffs, contended that the county court judge misdirected himself in arriving at the conclusion of fact stated in his judgment. [*Toulmin* v. *Millar* (3) and *Walker* v. *Fraser's Trustees* (4) were referred to.]

LORD READING C.J. This is an appeal from the decision of a Divisional Court ordering a new trial of an action tried in a county court. The action was brought by the plaintiffs to recover commission on the sale of a house. It appeared that in 1908 a house agent named Terry received instructions from the defendant to find a person who would either take a lease of or buy his house. Subsequent to that date Terry assigned his business to one Thompson, who in turn assigned it to Nightingale and Phillips. These four are all joined as plaintiffs, and so no question as to parties is raised. The mandate which

---

(1) 19 Times L. R. 575.

(2) (1892) 9 Times L. R. 12.

(3) (1887) 58 L. T. 96.

(4) 1910 S. C. 222.

Terry received from the defendant was to let the house at a rent of 120*l.* a year or to sell it for 2500*l.* That, however, does not mean that no commission at all would be payable if the house were let or sold through the agency of Terry for a lower sum. Terry succeeded in letting the house to a Mr. Sounes at a rent of 110*l.* a year for three years with an option to him to continue the tenancy for a term of five or seven years, and upon that letting Terry was paid commission. At the end of the three years the tenant said that he would not continue the tenancy unless the defendant made certain additions to the house. The defendant refused, and thereupon the question of purchasing the house arose, and Mrs. Sounes bought it from the defendant for 1900*l.* The plaintiffs claim commission in respect of that sale.

It is not suggested that there was any active intervention by Terry or any one of the plaintiffs after the original letting. The facts are not in dispute. Terry had brought about the original letting and nothing further was done by him. In my opinion the proper test in an action by a house agent to recover commission is that laid down by Collins M.R. in *Millar* v. *Radford* (1), in which apparently Mathew and Cozens-Hardy L.JJ. concurred, namely, whether "the introduction was an efficient cause in bringing about the letting or the sale," and not merely a causa sine qua non. In the present case the county court judge has found that "though the plaintiff introduced the property to Mr. and Mrs. Sounes, that introduction was not, in my view, the effective cause of the subsequent sale." That is a finding that the plaintiffs have not established that which is essential to their claim. The county court judge having found that fact upon evidence which entitled him so to find, it is not open to the Divisional Court or to this Court to interfere with that finding. It is not necessary to say whether we should have come to the same conclusion upon the evidence, though, speaking for myself, I think that I should have arrived at the same conclusion as the county court judge. In *Walker* v. *Fraser's Trustees* (2) the test applied seems to me to have been really the same, though the language used by the learned judge who delivered the judgment may have been different. In my opinion the county court judge has applied the right principle of law, and has come to a conclusion of fact fatal to the plaintiffs' claim. The appeal must be allowed, and the judgment of the county court judge restored.

---

(1) 19 Times L. R. 575.

(2) 1910 S. C. 222.

KENNEDY L.J. I entirely agree with what my Lord has said, and I propose to add very little. The county court judge has found as a fact that though the plaintiff Terry introduced the property to Mr. and Mrs. Sounes that introduction was not the effective cause of the subsequent sale. We cannot review that finding of fact unless we come to the conclusion that there is no evidence to support it. There is here ample evidence, and that really disposes of the case.

SWINFEN EADY L.J. I am of the same opinion. The county court judge has found a certain fact, and there is really no dispute about it. Terry, one of the plaintiffs, said in his evidence that the defendant instructed him in 1908 "to find a tenant or purchaser"; that he "succeeded in letting but failed to sell"; that he was paid commission on the letting, and that the matter was closed so far as he was concerned. The county court judge has found that the introduction of the property by Terry to Mr. and Mrs. Sounes was not "the effective cause of the subsequent sale." To my mind the evidence upon that is all one way, but, be that as it may, there is ample evidence to support that finding, and we are bound by the finding of fact of the county court judge. In *Millar* v. *Radford* (1) Collins M.R. laid down the test applicable to this class of case. The facts in that case are practically identical with those in the present case. The defendant there employed the plaintiffs to find a purchaser or, failing a purchaser, a tenant for a certain property. The plaintiffs failed to find a purchaser but found a tenant, and they were paid commission in respect of the letting. After the tenant had been in possession for about fifteen months he purchased the property from the defendant. The plaintiffs thereupon claimed commission on the sale, but the Court held

---

(1) 19 Times L. R. 575.

C. A.
1914

NIGHTINGALE
v.
PARSONS.

Swinfen Eady
L.J.

that they were not entitled to it. In delivering judgment Collins M.R. said: "The claim of house agents to be entitled to commission in circumstances like the present was a claim which was often made, and was likely to continue to be made. It was therefore important to point out that the right to commission did not arise out of the mere fact that agents had introduced a tenant or a purchaser. It was not sufficient to shew that the introduction was a causa sine qua non. It was necessary to shew that the introduction was an efficient cause in bringing about the letting or the sale. Here the plaintiffs failed to establish what was a condition precedent to their right to commission—viz., that they had brought about the sale. It was open to the defendant in an action like this to say either that, though the plaintiffs effected a sale, they were not his agents, or that, though they were his agents, they had not effected the sale. If the defendant proved either the one or the other, the plaintiffs failed to make out their case." Every word of that is applicable to the present case. The plaintiff Terry did not effect the sale, though he did effect the original letting. The sale was not brought about by him in any effective way.

Appeal allowed.

Solicitors for plaintiffs: *Hamlins, Grammer & Hamlins.*
Solicitor for defendant: *R. Barnes.*

W. F. B.

COMMISSIONERS OF INLAND REVENUE *v.* DUKE OF DEVONSHIRE.

1913
Dec. 10, 11, 17.

Revenue—Undeveloped Land Duty—"Dwelling-house"—Land "developed by erection of dwelling-houses"—Finance (1909-10) *Act*, 1910, *ss.* 16, 17.

Sect. 16, sub-s. 1, of the Finance (1909-10) Act, 1910, provides that "Subject to the provisions of this Part of this Act, there shall be charged, levied, and paid for the financial year ending the thirty-first day of March nineteen hundred and ten, and every subsequent financial year in respect of the site value of undeveloped land a duty, called undeveloped land duty, at the rate of one halfpenny for every twenty shillings of that site value."

Sub-s. 2: "For the purposes of this Part of this Act, land shall be deemed to be undeveloped land if it has not been developed by the erection of dwelling-houses."

Sect. 17, sub-s. 4: "Undeveloped land duty shall not be charged on the site value of any land not exceeding an acre in extent occupied together with a dwelling-house . . . ."

Held, (1.) that in the above-mentioned sections the word "dwelling-house" means a house, outbuildings, curtilage, and the open spaces included therein other than gardens or pleasure grounds; (2.) that a courtyard of a house (partly used for the purposes of a stable yard, partly as an approach to the kitchens and domestic offices, and the remainder for all the usual purposes to which a courtyard can be put) is included in the "curtilage" and is therefore not liable to undeveloped land duty under s. 16 of the Act; (3.) that so much land is "developed" within the meaning of s. 16 by the erection of a dwelling-house as is essential to its use as a dwelling-house by the class of persons who might, from the business point of view of a person dealing in houses, be expected to live in it, and the site of the house together with such an amount of adjoining land as complies with that description is "developed" by the erection of the house.

Sub-s. 4 of s. 17 does not mean that an acre of land in addition to that which is developed by the erection of a dwelling-house is to be free from undeveloped land duty. The sub-section means that an acre of the land which is occupied with a dwelling-house shall always be free of undeveloped land duty whether it includes developed or undeveloped land, thus giving the subject one acre of land free from the duty in addition to the site of his house (including the curtilage), while the sub-section does not prevent him, if more land than an acre is essential to the enjoyment of the house, from claiming that the excess over the acre is also free from the duty as developed land.

Petition by way of appeal on the part of the Commissioners of Inland Revenue (hereinafter called "the Commissioners") against the decision of a referee appointed under the Finance (1909-10) Act, 1910 (hereinafter called "the referee"), upon an appeal against the assessments which the Commissioners had made upon the respondent, the Duke of Devonshire, to undeveloped land duty under the above-mentioned Act and the Revenue Act, 1911 (1 Geo. 5, c. 2), for the years 1909-10, 1910-11, and 1911-12 in respect of Devonshire House, Piccadilly.

Devonshire House consists of a building (shewn on the plan) standing some distance back on the north side of and facing Piccadilly. Two wings extend from the main building towards Piccadilly. The wing on the west side of the house contains stables and dwelling-rooms above them. The wing on the east side contains kitchens and other domestic offices and also a porter's lodge. The house and wings are one building, forming three sides of a square. Between the main building, the two wings, and Piccadilly is a courtyard. A portion of the courtyard on the west side is paved and is used for the purposes of a stable yard. A similar portion of the courtyard on the east side is also paved and forms the approach to the kitchens and domestic offices. In the wall on the south side of the courtyard are two gates at the westerly and easterly ends. These gates are the only entrances to the courtyard. The only approach to the house, domestic offices, and stables is through these gates. There are also ornamental gates in the centre of the same wall. Part of the courtyard is gravelled and forms a place which can be used for all usual purposes to which courtyards can be put. In particular it is used for waiting carriages at all times.

A large portion of the courtyard is undermined by drains which go from the house and buildings to the sewers in the streets. There are also manholes and inspection chambers in connection with the drains in the courtyard. It would be impracticable to build over the courtyard. If the courtyard were built upon or otherwise used than as at present there would be no approach to the house, stables, or kitchens, the light and air to the rooms overlooking the courtyard would be shut out, and the drains would be interfered with.

At the back and to the north of the house is land consisting of a terrace and grounds extending northwards as far as Lansdowne

Passage. Numerous drains from the house run through the terrace, which is also pierced by manholes and inspection chambers. The area of the whole of the premises is about 162,000 superficial square feet and is enclosed between walls of the house and enclosure walls. On the west side the wall of the house continued by an enclosure wall is bounded by Stratton Street; on the north the enclosure wall is bounded by Lansdowne Passage, and on the east side the wall of the house continued by an enclosure wall is bounded by Berkeley Street.

The house with its ground was acquired by the then Duke of Devonshire from the Earl of Berkeley in 1696. This house was burnt down in 1733, and the present house was then erected. Ever since the purchase in 1696 the house has been occupied by the Duke of Devonshire for the time being, and except for the burning and re-erection the house and the rest of the premises have been in substantially the same general state and condition.

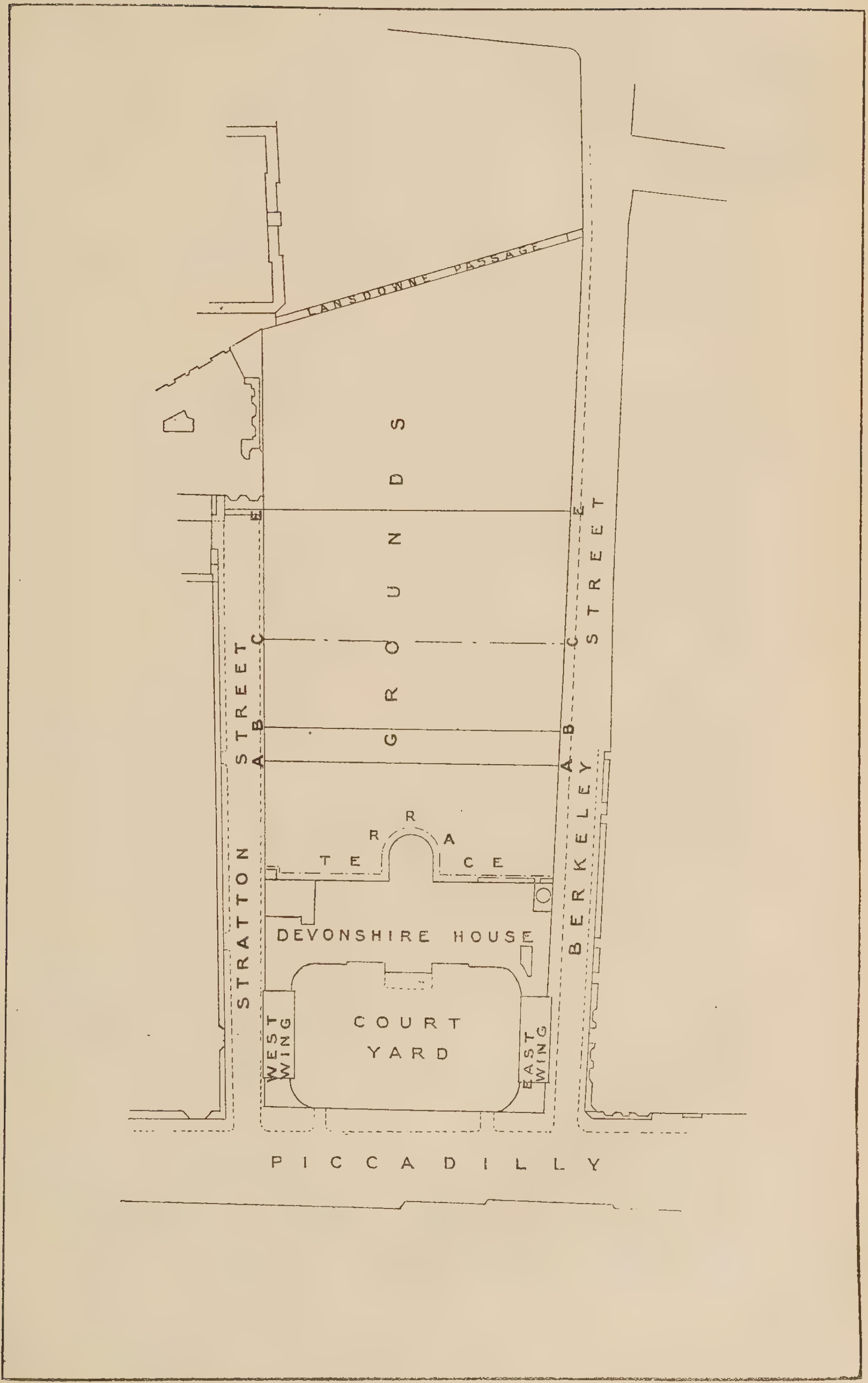
On January 1, 1912, the Commissioners gave notice in writing to the respondent that they had (as the fact was) made under the provisions of the above-mentioned Acts the following assessments upon him, namely, an assessment to undeveloped land duty for each of the years 1909-10, 1910-11, and 1911-12 in respect of so much of the hereditament as was undeveloped land within the meaning of the Acts and liable to duty thereunder. The assessment was in each year for the same sum, namely, 333*l.* 6*s.* 8*d.*, being ½*d.* in the pound on a sum of 160,000*l.*, which last mentioned sum was the net value which the Commissioners determined was chargeable with duty.

The Commissioners arrived at the respective assessments by taking the original assessable site value of the hereditament (400,000*l.*) and deducting therefrom the site value of the actual site of the said mansion house and outbuildings and the site value of one acre of the said land occupied therewith. Those deductions amounted to the sum of 240,000*l.*, leaving a sum of 160,000*l.* as the net value chargeable with the duty.

The Commissioners admitted (as they admitted at the hearing of the appeal before the referee) that in ascertaining the actual site of the mansion house and outbuildings they omitted to include as part of the mansion house and outbuildings certain basement projections which undoubtedly formed part of the same. A further allowance (the amount of which was inconsiderable and was not in dispute) would therefore in any case have to be made in respect of the site value of the basement projections. This matter was not (and there was no necessity that it should be) dealt with by the referee.

The Commissioners, in assessing the undeveloped land duty, limited the land developed by the erection of Devonshire House to the actual land on which the house itself and its foundations stand. In addition they allowed one acre of land free from tax under s. 17, sub-s. 4. This acre consisted of the courtyard in front of Devonshire House and an area at the back extending to the north as far as the line marked AA on the plan. On October 10, 1912, the respondent duly notified his intention of appealing to a referee against the assessment. On appeal the referee found that such land was "developed" by the erection of Devonshire House as was immediately adjoining thereto and essential for its enjoyment, and he fixed this as extending from the Piccadilly front to a line marked BB on the plan rather further back from the house towards the north than the line AA, the boundary of the acre allowed by the Commissioners as free from tax. He then allowed a further acre free. The boundary of this acre is marked upon the plan by a line marked EE. Against this finding the Commissioners appealed. They did not challenge the line BB the referee fixed if he was right on the construction he put on the words "developed by the erection of a dwelling-house"; but they disputed the construction put upon those words and contended that the developed land was limited to the site actually occupied by the buildings, without such yards or forecourts as might be included in a curtilage.

They also contended that the effect of s. 17, sub-s. 4, of the Finance (1909-10) Act, 1910, is that an acre occupied together with a dwelling-house shall always be free, whether it includes developed or undeveloped land, thus giving the subject one acre of land besides the site of his house, while the sub-section does not prevent him, if more land than an acre is essential to the enjoyment of the house, from claiming that the excess over the acre is also free from the tax as developed land.


LANSDOWNE PASSAGE
GROUNDS
STRATTON STREET
BERKELEY STREET
A
B
C
E
A
B
C
E
TERRACE
DEVONSHIRE HOUSE
COURT YARD
WEST WING
EAST WING
PICCADILLY

The respondent adopted the finding of the referee and did not dispute his finding of fact on the construction he adopted. The Commissioners contended that "dwelling-house" in s. 16, sub-s. 2, and s. 17, sub-s. 4, was limited to the actual buildings of the house and the foundations on which they stood, or, as a possible wider meaning, to the house and curtilage, including courtyards or stable yards, enclosed quadrangles, and approaches. The respondent contended that "dwelling-house" included outbuildings, curtilage or courtyard, and gardens immediately annexed to and usually occupied with it.

Sir S. O. Buckmaster, S.-G., and *W. R. Sheldon*, for the appellants. The question is whether under s. 17, sub-s. 4, of the Finance (1909-10) Act, 1910 (1), the respondent is entitled to claim exemption for land adjoining Devonshire House beyond the free acre allowed by the sub-section. All land not actually built upon is undeveloped land within the meaning of the statute subject to the allowance of one acre. The term "dwelling-house" in the sub-section means simply the actual house, and does not include the courtyard and land adjoining although used with the house. Land surrounding and necessary for the enjoyment of a house is not developed land although for practical reasons it cannot be built upon. Developed land may have three possible meanings in the statute. It may mean (1.) the site which supports the structure of a house—that is the contention of the appellants; (2.) the house and curtilage as opposed to the house and grounds; (3.) the house and so much land as is necessary for the enjoyment of the house and to render it a marketable property—that is the view the referee has taken. The "curtilage" of a house is something less than a garden and grounds of a house. It includes a paved yard, an area, and the space there often is at the back of an ordinary country house not including the garden of the house. In order to determine how much of the land is developed, the referee probably asked himself the question, "What land ought to be added to the house to make it marketable?" He has said that it would be impossible to let or sell it as a house unless the piece of land so added were included in the sale. Sect. 17, sub-s. 4, of the Finance (1909-10) Act, 1910, allows an acre free from taxation in addition to the dwelling-house, the undeveloped land which is the subject of taxation being defined by s. 16, sub-s. 2, as land which "has not been developed by the erection of dwelling-houses . . . ." and the word "dwelling-house" must be construed in the sense in which it is used in the statute. The object of s. 17, sub-s. 4, was to exempt from taxation land usually enjoyed with a house as an amenity to the house. But not more than an acre may be added to the house. If a person owns land so near to a town that it could be developed for building purposes he must pay an annual duty of ½*d.* in the pound for every 20*s.* of the site value, because the land is undeveloped land. The object of the statute is to secure that a person who is holding back land which would be available for building purposes shall not be permitted to hold it unless he pays the ½*d.* in the pound. If he objects to the duty he must sell the land. The Legislature in the first instance regards the whole of the land, including that on which a house stands, as undeveloped land which ought to be developed, and it then exempts the land on which the house stands and an additional acre.

---

(1) Finance (1909-10) Act, 1910, (10 Edw. 7, c. 8), s. 16, sub-s. 1: "Subject to the provisions of this Part of this Act, there shall be charged, levied, and paid for the financial year ending the thirty-first day of March nineteen hundred and ten, and every subsequent financial year in respect of the site value of undeveloped land a duty, called undeveloped land duty, at the rate of one halfpenny for every twenty shillings of that site value."

Sub-s. 2: "For the purposes of this Part of this Act, land shall be deemed to be undeveloped land if it has not been developed by the erection of dwelling-houses . . . ."

Sect. 17, sub-s. 4: "Undeveloped land duty shall not be charged on the site value of any land not exceeding an acre in extent occupied together with a dwelling-house or on the site value of any land being gardens or pleasure grounds so occupied when the site value of the gardens and pleasure grounds together with the site value of the dwelling-house does not exceed twenty times the annual value of the gardens, pleasure grounds, and dwelling-house as adopted for the purpose of income tax under Schedule A:

"Provided that the exemption under this provision shall not apply so as to exempt more than five acres, and where the land, gardens, or pleasure grounds occupied together with a dwelling-house exceed five acres in extent, those five acres shall be exempted which are determined by the Commissioners to be most adapted for use as gardens or pleasure grounds in connexion with the dwelling-house."

1913

INLAND REVENUE COMMISSIONERS v. DEVONSHIRE (DUKE).

The expression "dwelling-house" in s. 17, sub-s. 4, means the dwelling-house itself, i.e., the building. The courtyard of the size of that of Devonshire House is regarded as a garden. That construction is consistent with the provision in s. 8, sub-s. 4 (*b*), which treats the dwelling-house as distinct from the offices, courts, yards, and gardens occupied with it. In s. 17, sub-s. 4, the expression "dwelling-house" is used in a very restricted sense. But for that sub-section the land occupied with the structure would not have been exempted. Land is developed to the extent of one acre if it is occupied in connection with a dwelling-house. In any event a dwelling-house cannot mean more than a house and curtilage. The referee was wrong because he has allowed more than an acre as being occupied with the house. [*Smith* v. *Martin* (1) and s. 17, sub-s. 5, of the Finance (1909-10) Act, 1910, were also referred to.]

Danckwerts, K.C., and *W. Allen*, for the respondent. In the courtyard in the front of the house are private drains over which it would be illegal for the respondent to build. There are also drains and manholes at the back of the house. The courtyard is a necessary adjunct of the house. The word "house" has a well-known and clear meaning. Sect. 26 of the Finance (1909-10) Act, 1910, shews that every piece of land has to be valued as a whole, and it follows that Devonshire House must be valued as a single entity subject to any apportionment the Commissioners may make under s. 29. In a statute imposing taxes the Court must ascertain clearly what the subject-matter of the taxation is. The governing consideration in ascertaining whether land is undeveloped is whether it is land which could as a business proposition be used to be built upon. Land may be used for trade without being actually adjacent to a building, e.g., land used for the deposit of waste. Land is developed if it is so connected with a building that it is a necessary or reasonable adjunct to it. The law compels a vacant space to be left at the back of and around a house: e.g., the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 41; the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 157. Wholesome light and ventilation are necessary. How much land is reasonably necessary

(1) (1673) 2 Wms. Saund. 400.

for the enjoyment of the house must depend on circumstances. It is clear from s. 92 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and *Grosvenor* v. *Hampstead Junction Ry. Co.* (1) that the term "house" includes according to its legal meaning a garden. Whatever is reasonably necessary for the occupation of a house is comprehended in the term "house" and passes with it: *Steele* v. *Midland Ry. Co.* (2); *Marson* v. *London, Chatham and Dover Ry. Co.* (3); Elphinstone on the Interpretation of Deeds, 1st ed., c. 13, r. 50; *Bettisworth's Case.* (4) It is therefore clear that the word "house" includes more ground than the four walls enclose and comprises the curtilage and gardens of the house. The land can only be taxed if it is undeveloped land within the meaning of s. 16. If s. 17, sub-s. 4, is to be treated as an exempting section, the necessary implication is that but for the exemption the land would be taxable, and it can only be taxable if apart from the exemption it is undeveloped land. The words "occupied together with a dwelling-house" in s. 17, sub-s. 4, do not mean that the land must necessarily adjoin the house. The sub-section deals with land, gardens, and pleasure grounds occupied with a house. In the proviso to the sub-section the words "this provision" include the whole of the sub-section. Sub-s. 4 is therefore one provision with two branches. It includes the case of land not exceeding one acre in extent and land not exceeding five acres. The exemption of one acre in sub-s. 4 of s. 17 applies to undeveloped land, and the object of the exemption is to encourage open spaces. The question is what is reasonably necessary for the enjoyment of the occupation of Devonshire House. Land is also developed if it is placed outside building possibilities as a practical proposition. [*Rex* v. *Special Commissioners of Income Tax* (5) and the Model By-laws of the Local Government Board were also referred to.]

Sir S. O. Buckmaster, S.-G., in reply. It is not disputed on behalf of the appellants that the use of the word "house" in a will or conveyance, and possibly in the Lands Clauses

---

(1) (1857) 1 De G. & J. 446.

(2) (1866) L. R. 1 Ch. 275, at p. 289.

(3) (1868) L. R. 6 Eq. 101.

(4) (1591) 1 Rep. pt. ii. 516.

(5) (1908) 98 L. T. 446.

Consolidation Act, 1845, includes a certain amount of land to be occupied with it. The word "house" may have different meanings according to circumstances. In ordinary language in connection with a burglary or in a policy of fire insurance it would mean the structure. The question in the present case is what is its meaning in s. 17, sub-s. 4, of the Finance (1909-10) Act, 1910.

Cur. adv. vult.

1913. Dec. 17. The following judgment was read by

Scrutton J. The Commissioners of Inland Revenue appeal against a decision of the referee fixing the part of the land and gardens in which Devonshire House, Piccadilly, is situate, which is liable to be assessed to undeveloped land duty at the annual rate of one halfpenny for every 20*s*. of its site value. Sect. 16, sub-s. 1, of the Finance (1909-10) Act, 1910, imposes this duty on undeveloped land. Sub-s. 2 provides that land shall be deemed to be undeveloped land if it has not been developed by the erection of dwelling-houses; and s. 17, sub-s. 4, provides that undeveloped land duty shall not be charged on the site value of any land not exceeding an acre in extent occupied together with such a dwelling-house.

Interpreting these sections the Commissioners of Inland Revenue limited the land developed by the erection of Devonshire House to the actual land on which the house and its foundations stand. This is shewn on the agreed plan put in before me surrounded by a dotted line, and its accuracy is agreed. The Commissioners allowed the Duke, in addition, one acre of land free from tax under s. 17, sub-s. 4. This acre they appropriated to the courtyard in front of Devonshire House, and an area at the back extending to the line marked AA on the agreed plan. The referee found that such land was developed by the erection of Devonshire House as was immediately adjoining thereto and essential for its enjoyment; and he fixed this as extending from the Piccadilly front to the line marked BB rather further back from the house than the line of the Commissioners, AA on the agreed plan. In addition, he held that the Duke was entitled to a further acre of undeveloped land, the extent of which was shewn by a line marked EE on the agreed plan. Against this the Commissioners appealed. If the referee was right in the construction he put on the words "developed by the erection of a dwelling-house," they did not challenge the line he fixed as expressing his construction, but they did dispute that the Duke was entitled to an additional acre of exemption. At the start, however, they disputed the construction which the referee had put on the above words, and contended that the developed land was limited to the site actually occupied by the buildings as enclosed by the dotted line on the plan without such yards or forecourts as might be included in a curtilage. The respondent adopted the construction of the referee, and did not dispute his finding of fact on the construction he adopted.

The questions thus raised are of great importance in the case of all houses occupied with more than an acre of land, especially of all large houses. The first question seems to me to be the meaning of the word "dwelling-house" in s. 16, sub-s. 2, and s. 17, sub-s. 4. The Commissioners contended that it was limited to the actual buildings of the house and the foundations on which they stood. The plan produced shewed by the dotted line their application of this principle to Devonshire House. They admitted as a possible wider meaning the house and curtilage, including courtyards or stable yards, enclosed quadrangles, and approaches. The respondent contended that, just as in many cases under wills, deeds, or the Lands Clauses Consolidation Acts, a house included outbuildings, curtilage, or courtyard and gardens immediately annexed to and usually occupied with it, so the word "dwelling-house" had the same meaning here, and that the curtilage and gardens occupied with Devonshire House for nearly two hundred years were "the dwelling-house." It seemed, however, clear that in the second prohibition of charge in s. 17, sub-s. 4, the word "dwelling-house" was not used in either the sense contended for by the respondent or by the Commissioners. In that prohibition the annual value under Sched. A was split up into "the dwelling-house" and "the gardens and pleasure grounds." The curtilage and yards and similar open spaces therein were clearly not "gardens and pleasure grounds," and must therefore be "dwelling-house," which in that prohibition

I take therefore to mean house, outbuildings, and curtilage. The first prohibition in that sub-section distinguishes a dwelling-house from land occupied with it. It is improbable that the word is used in a different sense in ss. 16 and 17, and I construe the word "dwelling-house" in those sections as "house, outbuildings, curtilage, and the open spaces included therein other than gardens or pleasure grounds."

I have next to apply this definition to the actual facts. To help me to understand the agreed plan I had a view of Devonshire House. The main body of the present house, erected about 1733, stands between Berkeley Street and Stratton Street, Piccadilly, named after Lord Berkeley of Stratton, which were carved out of the gardens of Berkeley House, the predecessor of Devonshire House, under the advice of John Evelyn. When in 1913, under an Act of 1910, a question is raised whether the present gardens of Devonshire House are developed by the present building, it is not without interest to read John Evelyn's Diary, under date June 12, 1684:—

"12th June. I went to advise and give directions about the building two streets in Berkeley Gardens [that is Berkeley Street and Stratton Street] reserving the house and as much of the garden as the breadth of the house. In the meantime I could not but deplore that sweet place (by far the most noble gardens, courts, and accommodations, stately porticoes, &c., anywhere about the town) should be so much straitened and turned into tenements. But that magnificent pile and gardens contiguous to it built by the late Lord Chancellor Clarendon being all demolished and designed for piazzas and buildings was some excuse for my Lady Berkeley's resolution of letting out her ground also for so excessive a price as was offered, advancing near 1000*l.* per annum in mere ground rents; to such a mad intemperance was the age come of building about a city, by far too disproportionate already to the nation; I have in my time seen it almost as large again as it was within my memory."

What John Evelyn, who condemned the mad intemperance of 1000*l.* a year in ground rents for the gardens given up to make Berkeley and Stratton Streets, would have said to the present valuation of the land of the present gardens without buildings at 400,000*l*. it is not easy to conjecture. The main building, still, as in Evelyn's new plan, the breadth of the garden, has two low wings running forward to Piccadilly. Between their extremities a wall with gates forms the Piccadilly boundary, and encloses a courtyard, partly paved, partly gravel. On one side are stables, and part of the courtyard is used for standing and cleaning carriages. Several rooms get all their light from the courtyard, and it contains both the principal and the servants' and tradesmen's entrances. On the Berkeley Street side of the house and wing, within the agreed site of the "house," are two small stone-paved yards open to the sky, and on the Stratton Street side behind the house is an open space with a small grass lawn, partly enclosed, which is agreed as part of the house, but which but for the agreement I should have considered not as house but as "curtilage."

The Commissioners, limiting "dwelling-house" to actual buildings, included the front courtyard in the free acre under s. 17, sub-s. 4. The referee and the respondent treated the courtyard as part of the house. Treating the "house" as I do as including the curtilage, I find that the courtyard is "curtilage" and not taxable. The same result is also arrived at by treating it as essential to the enjoyment of the house, which is the referee's view.

The next question is, what extent of land is under s. 16 "developed" by the erection of the dwelling-house? The Commissioners say, "Only the actual land occupied by the house." The referee and the respondent say, "Such other land adjoining as is essential to its enjoyment as a house," a question of fact in each case. The other part of s. 16 does not give much help here, for the question how much land is developed by the erection of buildings for trade will rarely become practical, as land adjoining trade buildings though not occupied by them is not taxed if used for trade, as it generally will be. The object of the undeveloped land duty appears to be in the case of land worth over 50*l*. an acre, which has a higher value for building or trade purposes than it has for agriculture, to impose a tax on such excess value, one of the purposes of the Legislature, as I gather from the statute, being to force such land into the market for trade or building of houses. This is said to "develop" the land—meaning, I suppose, to bring out its latent capabilities, one of the meanings of the word "develop" given in the Oxford Dictionary. What happens if you erect a dwelling-house on land? That it may be an effective dwelling-house some more land than it actually covers is clearly necessary. You cannot build right up to its front or back door, depriving it of access, or up to its windows, depriving it of light and air. A certain space must be allowed between it and other buildings, and you cannot build over its drains; the notion of a dwelling-house on land involves the notion of vacant land round it essential to its effectiveness. And, further, as houses are built to sell or let or live in, I think it involves so much land as would ordinarily be expected to go with a house of that size, if it is to be merchantable or livable, and not in the language of the Act to become "derelict." I should express the referee's view "essential to its enjoyment" as "essential to its use as a dwelling-house by the class of persons who might, from the business point of view of a person dealing in houses, be expected to live in it"; and I regard the site of the house together with such an amount of adjoining land as complies with that definition as "developed" by the erection of such a house.

Again, applying this definition to the facts, the referee applying such a principle fixed line BB on the agreed plan as shewing the amount of land at the back of the house which he considered essential to its enjoyment and therefore "developed." If his principle of construction was correct, neither side objected to his application of it, and after viewing the premises I see no reason to differ from it. Then there arose a further question of construction of great general importance. The referee has, in addition to line BB on the agreed plan, allowed the Duke another acre of land up to line EE, conceiving himself bound to do so by s. 17, sub-s. 4, "Undeveloped land duty shall not be charged on the site value of any land not exceeding an acre occupied together with a dwelling-house." The respondent contends that he was right, for he says s. 17 is all exemptions. You do not exempt developed land, but undeveloped land. The land essential for enjoyment is developed land; therefore the acre exempted by s. 17, sub-s. 4, must be given from the undeveloped land beyond. The Commissioners reply that s. 17 is not entirely an exemption section, but the nature of the tax on undeveloped land has to be gathered from ss. 16 and 17, neither of which contains a full definition. That it is on land not developed by building or trade comes from s. 16; that it is on the excess of trade value over agricultural value, and only where the higher value is over 50*l.* an acre, comes from s. 17. The respondent's view of the amount of land developed may always raise difficult questions, and, say the Commissioners, perhaps it was to avoid these that sub-s. 4 provided in effect that an acre occupied together with a dwelling-house shall always be free, whether it is developed or undeveloped land. This avoids troublesome questions of the exact amount of land essential to enjoyment by always giving the subject one acre of land besides the site of his house, while it does not prevent him, if more land than an acre is essential to the enjoyment of the house, from getting the benefit of it. For the excess over an acre will be developed land, and not liable to the tax. And, say the Commissioners, if he has got protection for all land essential to the enjoyment of the house, there was no need to give him an acre more than was essential for the enjoyment of his house.

I have come to the conclusion that the contention of the Commissioners on this point is right and the decision of the referee wrong. Sub-s. 4 distinguishes between the house (including curtilage) and the land occupied with it, and is not dealing with developed or undeveloped land. It avoids in many cases disputes as to the latter division by giving the owner absolute protection as to an acre of land occupied, which may be more than the land developed. But it does not stop him from proving that more than an acre is developed land, in which case the excess of developed land over an acre will pay no tax, as well as the acre free from tax, both under sub-s. 4 and because it is developed. While it protects him in this respect, it does not, in my view, give him the additional benefit, for which I see no reason, of exemption for an acre of land beyond what is essential for the enjoyment of his house in the meaning already explained.

I have lastly to apply this to the facts of the case. Devonshire House with its curtilage occupies the land from Piccadilly to the agreed dotted line bounding the house at the back, and is not the subject of undeveloped land duty. There is essential to its enjoyment, and therefore developed by its erection, the land at the back of the house up to line BB. This being land developed is not taxable. But the subject is entitled to one acre of land occupied with his house (which I have defined as house and curtilage) free of this tax. He is therefore entitled, free of tax, to one acre running backwards from the dotted line bounding the house at the back. I understand this to be agreed as line CC. If there is any point in the exact position of this line on which the parties cannot agree, the referee or myself can settle it. Part of this acre is already free as developed land, but the balance is given under s. 17, sub-s. 4. I think the construction of the referee which gives the acre from line BB to line EE is, for the reasons already given, erroneous.

My decision therefore is that the hereditament from its Piccadilly front to line CC on the agreed plan is free from undeveloped land duty for the reasons given in the judgment. The rest of the hereditament is chargeable. The figures, if not agreed, can be brought before me. As each side has partly failed in its contentions, I order each party to pay his own costs here and below.

Judgment accordingly.

Solicitor for appellants: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Currey & Co.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.
1914
Feb. 4, 5, 27.

DRUMMOND, Appellant *v.* COLLINS (Surveyor of Taxes), Respondent.

Revenue—Income Tax—Foreign Possessions—Property settled on Infants—Infants not entitled to a Vested Interest—Provision for Maintenance and Education—"Uncontrolled Discretion" of Trustees—Sums remitted to Guardian in United Kingdom for Maintenance and Education—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 41; *s.* 100, *case* 5—*Income Tax Act*, 1853 (16 *&* 17 *Vict. c.* 34), *s.* 2, *Sched. D.*

A foreigner resident abroad by his will gave his property, which was situate abroad, to trustees upon trust for the benefit of his deceased son's children, who were minors, for life and their issue after them, there being a provision that the trustees should accumulate the income of the respective shares of the children and add the accumulations to capital until each child should attain the age of twenty-five years, when, and not before, the child was to become entitled to a portion of the accumulated fund. The will contained a direction to the trustees, "out of the net income of the proportionate share of the trust estate held in trust for any child," to make such provision from time to time as they in their uncontrolled discretion might think necessary or advisable for the suitable maintenance and education of such child. The trustees from time to time remitted to the mother of the children, who was their guardian and who was residing with them in England, sums of money in accordance with the provisions of the will for the maintenance and education of the children:—

Held by the Court of Appeal (Cozens-Hardy M.R. and Sir S. Evans, P., Joyce J. dissenting), that the moneys so remitted were assessable to income tax under s. 100, case 5, of the Income Tax Act, 1842, Sched. D, as being moneys received in this country in respect of foreign possessions.

Decision of Horridge J. [1913] 3 K. B. 583 affirmed.

Appeal from a decision of Horridge J. (1) upon a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the division of Daventry in the county of Northampton.

1. At a meeting of the Commissioners on October 18, 1911, Mrs. Albertine Drummond, the appellant (previously Mrs. Albertine Field), appealed against an assessment in the sum of 10,000*l.* for the year ending April 5, 1908, in respect of

---

(1) [1913] 3 K. B. 583.

C. A.
1914

Drummond v. Collins.

remittances from foreign possessions and made under s. 100, case 5, of the Income Tax Act, 1842 (1), and s. 2, Sched. D, of the Income Tax Act, 1853.

2. The appellant in 1890 married the late Mr. Marshall Field, junior, who died in November, 1905, and by whom she had three children, Marshall, Henry, and Gwenderlyn, who are minors under the age of twenty-one years and to whom she is guardian. In September, 1908, she married Mr. Maldwin Drummond, of 4, Down Street, Piccadilly, in the county of Middlesex, who is still living.

3. The appellant's late husband, Mr. Marshall Field, junior, was the son of the late Mr. Marshall Field, of Chicago, who died in January, 1906, having by will dated June 14, 1904, made certain provision for his son, and on the death of his son for his son's widow and their children.

4. The material clauses of this will as affecting the children of the appellant are as follows:—

Seventh. "After the death of my son, if he shall die leaving any child or children or issue of a child or children him surviving, I direct said trustees to hold the trust estate and to apply the net income and ultimately the capital as hereinafter provided for the use and benefit of all the children of my son surviving him, and for the use and benefit of the issue of any child or children that may have died, said issue taking a parent's share per stirpes. It is my will that in such case the trust estate and the income thereof shall be so held, administered, and applied by said trustees that each of my grandsons Marshall Field and Henry Field, now living, or their respective issue shall respectively receive a double portion, that is, twice as much as any other child, or issue thereof, of my son, and that any other surviving children of my son, and their issue per stirpes, shall receive equal shares. Out of the net income of the proportionate share of the trust estate held in trust for any child of my son, or issue of a child, I direct that said trustees make such provision from time to time as they in their uncontrolled discretion may think necessary or advisable for the suitable maintenance and education of such child, or issue thereof, until such child or issue thereof shall be entitled under provisions hereinafter contained to receive payments of income directly from said trustees. Such provision shall be paid over by said trustees from time to time to each such child or issue thereof, or to the guardian or guardians of each child or issue thereof, or may be otherwise applied for the benefit of each such child or issue thereof as said trustees may think desirable. If and so far as the suitable maintenance or education of any such child or issue thereof shall from time to time appear to said trustees to be sufficiently provided for in other ways or from other sources said trustees shall refrain from making any provision therefor out of said trust estate.

---

(1) 5 & 6 Vict. c. 35, s. 100, case 5, applicable to Sched. D: "The duty to be charged in respect of possessions . . . . in the British plantations in America, or in any other of Her Majesty's dominions out of Great Britain, and foreign possessions.

"The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the actual sums annually received in Great Britain, either for remittances from thence payable in Great Britain, or from property imported from thence into Great Britain, or from money or value received in Great Britain and arising from property which shall not have been imported into Great Britain, from money or value so received on credit or on account in respect of such remittances, property, money, or value brought or to be brought into Great Britain, computing the same on an average of the three preceding years, as directed in the first case, without other deduction or abatement than is hereinbefore allowed in such case."

By the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 5, the term "Great Britain" in the Income Tax Act, 1842, shall be read as meaning the United Kingdom.

Sched. D is contained in s. 2 of the Income Tax Act, 1853, but by s. 5 the duties are to be assessed under the regulations and provisions of the Income Tax Act, 1842.

"In the cases respectively of my son's three children, now living, Marshall and Henry and Gwenderlyn, said trustees shall, upon the death of my son and subject to the above directions respecting provision for maintenance and education, retain and hold all the net income of their respective shares of the trust estate and invest and reinvest the same for accumulation, and add the accumulations of income to the capital of their said shares respectively, until my said three grandchildren shall respectively attain the age of twenty-five (25) years. From and after the time when they shall respectively attain the age of twenty-five (25) years said trustees shall pay over to them in regular quarterly instalments during their lives for their own use one half (½) of the net income of their respective shares of the entire trust estate enhanced by accumulations added thereto as herein directed, and the other one half (½) of the net income of their respective shares of the entire trust estate said trustees shall retain and hold and shall invest and reinvest for accumulation, adding the accumulations of income to the capital of their respective shares, until my said three grandchildren shall respectively attain the age of thirty-five (35) years. Thereafter from the time when they shall respectively attain the age of thirty-five (35) years said trustees shall pay over to them in regular quarterly instalments during their respective lives, for their own use, all the net income of their respective shares of the entire trust estate."

Twenty-second. "I direct that no title or interest in any of the several trust funds in my will created or in the money or other property composing them or any of them or in the income accruing thereon or in its accumulations shall vest in any beneficiary under any such trust during the continuance of the trust; nor shall any beneficiary acquire any right in or title to any instalments or instalment of income otherwise than by or through the actual payment of each instalment respectively by the trustee or trustees of the respective trust estates and the receipts thereof in each case by the beneficiary, nor shall any beneficiary have any right or power by draft assignment or otherwise to anticipate or to mortgage or otherwise encumber in advance any instalments or instalment of income, nor to give orders in advance upon the trustees or trustee for any instalments or instalment of income."

Subject to the above provisions the trust estate was settled upon the issue of the grandchildren and on failure of all these trusts was given to the testator's brothers and sisters.

5. After the death of her late husband, the said Mr. Marshall Field, junior, the appellant resided in America until the beginning of April, 1906, when she left that country with her three children, who always resided with her, and arrived in London at the end of April, 1906, and resided for a short time at Claridge's and other hotels there. Subsequently she travelled

for a time in the United Kingdom until September 30, 1906, from which date until Christmas, 1906, she rented and resided in a furnished house at Ashby St. Ledgers, in the county of Northampton. From Christmas, 1906, until July, 1907, she resided abroad.

6. In July, 1907, the appellant took a lease of Danesbury House, Welwyn, Herts, and resided there until April 5, 1908.

7. The appellant received remittances of income in respect of her personal estate abroad amounting to the sum of 274*l.*, and liability to be assessed for the year ending April 5, 1908, and to pay income tax in respect of such remittances was admitted, and no question for the consideration of the Court arose in respect thereof.

8. It was also admitted by the appellant that considerable remittances—the subject of the present assessment—had been received by her from America from the trustees of the estate of the late Mr. Marshall Field in accordance with the provisions of the above mentioned will for the education and maintenance of her said three children, but she declined to state the amount of the said remittances on the ground that, as she contended, there was no liability to assessment in respect thereof, and she produced a letter written by the said trustees dated April 14, 1911, which was in the following terms:—

"Illinois Trust and Savings Bank,
"Chicago,
"April 14th, 1911.

"Trust Department.
"Mrs. Albertine Drummond,
"Chicago, Illinois.

"Dear Madam,

"We have carefully considered your request for a statement of the amount of moneys advanced to you by us as trustees under the seventh article of the will of Marshall Field deceased during the last five years and in reply we beg to state:—

"We hold as trustees under said will a fund the income on which belongs to us as trustees. We are empowered by the will to make such provision from time to time as we in our uncontrolled discretion may think necessary or advisable for the suitable maintenance and education of your children who are the grandchildren of the said Marshall Field.

"We are expressly empowered to make such provision in such way as we may think desirable. We have chosen to forward to you from time to time funds held by us under this article for application by you for the suitable maintenance and education of your children. These funds thus advanced to you we have intended should be used by you for that purpose.

"The funds so advanced are in no sense income payable to you under the terms of said will. Continuance of such payment to you is not demanded by the will, but it is open to us to consider any other method of providing for the maintenance and education of the children we may think desirable.

"We object to the diminution of the fund by the payment of any income tax levied upon the theory that the moneys so advanced to you are, in a legal sense, income payable to you. If such diminution should occur we should be led to consider some other method of caring for the question of the maintenance and education of the children.

"We understand that you desire the report which you have requested in connection with the demand upon you for the payment of an income tax on this fund. For the reasons stated we must decline to furnish you the statement which you request.

"We think that an accurate statement of the character of the advances made by us should demonstrate that the advances so made are not in any sense income payable to you, and that such statement should dispose of any such question.

"Yours truly,
"Illinois Trust and Savings Bank,
"By William H. Henkle,
"Secretary.

"Chauncey Keep }
"Arthur B. Jones } Trustees."

9. It was contended on behalf of the appellant: That on the facts proved and on the true construction of the said will and of the said statutes the fund held by the trustees was not wholly or in part a foreign possession of the appellant and/or of her children or any of them; that the mere exercise by the trustees of their

discretion in remitting certain of the moneys accruing to them from such fund or part of it did not in law operate to transform such fund or any part of it into a foreign possession of the appellant and/or of her said children or any of them, and did not render or constitute the said remitted sums a property or concern of the said infants, and the mere exercise of the discretion by the trustees in remitting such sums to the appellant did not constitute her a guardian of the property and concern of the said infants; and that on the facts proved and on the true construction of the said will and of the said statutes the said remittances were in the nature of voluntary payments.

10. The surveyor contended on behalf of the Crown:—

(*a*) That as by the provisions of the will of the late Marshall Field the trustees are directed to make provision for the suitable maintenance and education of his grandchildren, the trustees, notwithstanding the "uncontrolled discretion" clause, had no option but to make such payments, seeing that they must be regarded as being in the opinion of the trustees "necessary or advisable for the suitable maintenance and education" of the children, and that the children were not, in their opinion, otherwise sufficiently provided for.

(*b*) That the payments were not voluntary allowances, as contended by the appellant, but were remittances of income to which the grandchildren of the testator were legally entitled under the provisions of their grandfather's will.

(*c*) That the appellant as guardian of the testator's grandchildren was correctly assessed in respect of the said remittances under the provisions of s. 41 of the Income Tax Act, 1842.

11. The Commissioners after hearing and fully considering the evidence and arguments found: That the appellant received certain remittances amounting to the sum of 274*l.* in her own right, and further remittances, the amount of which was not disclosed, as guardian of her said three children under the provisions of the will of their grandfather, the late Mr. Marshall Field, and held that she was liable to be assessed in respect of the said remittances, and they confirmed the assessment accordingly.

No question arose in this case as to the form of the assessment.

The sole question for the consideration of the Court was whether the appellant was liable to be assessed as guardian of her children in respect of the remittances made to her under the provisions of the will of the late Mr. Marshall Field. If the question was answered in the negative and in favour of the appellant, it was agreed that the assessment was to be reduced to the sum of 274*l.* as representing the amount of the remittance which she received in her own right; and if the question was answered in the affirmative and in favour of the Crown, the case was to be referred back to the Commissioners to ascertain the amount of the remittances in question, and to adjust the amount of the assessment accordingly.

Horridge J. held that the remittances made by the trustees were assessable to income tax under s. 10, case 5, of the Act of 1842, Sched. D, as being moneys received in this country in respect of foreign possessions, or as being in themselves foreign possessions. From this decision Mrs. Drummond appealed.

Sir R. B. Finlay, K.C., and *G. A. Scott*, for the appellant. The moneys remitted by the trustees are not taxable as having been received in respect of foreign possessions within s. 100, case 5, of the Income Tax Act, 1842, Sched. D.

Lord Herschell in *Colquhoun* v. *Brooks* (1) interpreted "possessions" as meaning something possessed and which is a source of income, and Lord Macnaghten construes the word in its widest and most comprehensive sense as meaning source of income. The words of the will in this case shew that these children possess nothing, and that they are not entitled to this income, the payment of which is purely voluntary. The assessment is not made on the appellant in her private capacity but as guardian of the children.

[JOYCE J. If this money were to be sent over here to some one else to pay school fees, for instance, that would be expenditure and not receipt.]

Yes. The object of the testator was that everything should go on just as if he were alive and living in America and providing for his children over here.

(1) (1889) 14 App. Cas. 493, 508, 516.

These were purely voluntary payments and not assessable: *Turner* v. *Cuxon* (1); *Herbert* v. *McQuade* (2); *Blakiston* v. *Cooper* (3); *Poynting* v. *Faulkner*. (4)

To be assessable, there must be a remittance to a person which that person can do what he likes with; but there is nothing of the kind in the present case, this money has to be applied for the benefit of the children. If the trustees had paid this money direct to college authorities or schoolmasters as they could have done had they so chosen, how could it be said to have been received by the appellant? The Crown cannot be in a better position than if the money had been sent direct to the creditors.

The remittances are in no sense "profits or gains" within the Act of 1853, s. 2, Sched. D, to which schedule only the rules and regulations of the Act of 1842 are made applicable under s. 5 of the later Act.

The question is one of fact: *Scottish Provident Institution* v. *Allan* (5); and on the facts of this case it is obvious that there is no right to have the money remitted; and there is no binding trust which the children can enforce: *McCormick* v. *Grogan*. (6)

In *Partington* v. *Attorney-General* (7) Lord Cairns lays it down that fiscal Acts must be construed strictly, and there are no special provisions here as to voluntary payments arising from foreign possessions.

A person may be under a legal duty to make a payment, but unless the payee can enforce it, it is, if made, a voluntary payment. The trustees have an absolutely uncontrolled discretion. The Court may say to them "you must carry out the duty," but the trustees may answer "we have exercised our discretion": *Gisborne* v. *Gisborne*. (8)

This is an American will and ought to be construed according to the law of the testator's domicil: *Studd* v. *Cook* (9); *In re Price, Tomlin* v. *Latter* (10); *In re D'Este's Settlement Trusts*. (11)

[*Sir John Simon, A.-G.*, referred to *Lloyd* v. *Guibert*. (12)]

---

(1) (1888) 22 Q. B. D. 150.
(2) [1902] 2 K. B. 631.
(3) [1909] A. C. 104.
(4) (1905) 5 Tax Cases, 145.
(5) [1903] A. C. 129.
(6) (1869) L. R. 4 H. L. 82.
(7) (1869) L. R. 4 H. L. 100.
(8) (1877) 2 App. Cas. 300.
(9) (1883) 8 App. Cas. 577.
(10) [1900] 1 Ch. 442.
(11) [1903] 1 Ch. 898.
(12) (1865) L. R. 1 Q. B. 115.

The question of the construction of a foreign will was not before the Court there: *Di Sora* v. *Phillips.* (1) Even if this will be construed according to English law there is no right in the beneficiaries to compel the trustees to remit these moneys as income: *Wilson* v. *Turner.* (2)

W. Finlay (*Sir John Simon, A.-G.*, with him), for the respondent. The American trust fund is a "foreign possession" of the infants and the sums remitted to the guardian in England are derived from it and are therefore liable to income tax under case 5 of Sched. D of the Act of 1842. "Possession" is a word used non-technically and in the widest possible sense, so that it will include the infants' contingent interest in the fund. It is said, first, that the trust fund is the possession of the trustees and not of the beneficiaries, but it is submitted that that contention cannot be supported. If the trustees were to misappropriate the fund the infants, by their next friend, could appear in assertion of their right to recover it. Again it is said that the trustees in the exercise of their discretion might refuse to remit these moneys, and therefore they are not taxable. But the remittances have been made, and it is immaterial to what purposes they are applied. They constitute income of the infants which is liable to duty: *In re Allan, Havelock* v. *Havelock* (3); *Mersey Docks* v. *Lucas* (4); *London County Council* v. *Attorney-General* (5); *Duncan's Executors* v. *Farmer.* (6) It is not sought to support the second ground of the judgment of Horridge J., namely, that the remittances are themselves a foreign possession.

As to the application of foreign law, the principle is clear. When a foreign instrument has to be construed the foreign law must be proved by those who rely upon it. The Crown does not here seek to import any consideration of foreign law; the will must be construed according to English law.

Studd v. *Cook* (7) and *In re Price* (8) do not apply.

G. A. Scott in reply.

Cur. adv. vult.

---

(1) (1863) 10 H. L. C. 624.
(2) (1883) 22 Ch. D. 521.
(3) (1880) 17 Ch. D. 807.
(4) (1883) 8 App. Cas. 891
(5) [1901] A. C. 26.
(6) (1909) 5 Tax Cases, 417.
(7) 8 App. Cas. 577.
(8) [1900] 1 Ch. 442.

C. A.
1914

DRUMMOND
v.
COLLINS.

COZENS-HARDY M.R. Mr. Marshall Field, of Chicago, by his will dated June 14, 1904, made very large provisions for his son, Marshall Field, junior, and his issue. The son died in November, 1905, in the lifetime of the testator, who died in January, 1906. The son left three children, two boys and one girl, all of whom are still infants. Their mother, now Mrs. Drummond, is their guardian. They are residing with her in England. Considerable remittances have been received by her from the trustees in America for the education and maintenance of the three children. The question on this appeal is whether she is liable to be assessed as guardian of her children in respect of these remittances. The answer to this question depends (1.) upon the true construction and effect of the elaborate will, and (2.) upon the construction of s. 100, case 5, of the Income Tax Act, 1842, and of s. 41 of the same Act, and upon s. 2, Sched D, of the Act of 1853. In the event, which happened, of the son's death in the testator's lifetime, a sum of $5,000,000 was given to trustees who were "to hold the trust estate and to apply the net income and ultimately the capital as hereafter provided for the use and benefit of all the children of my son surviving him and for the use and benefit of the issue of any child or children that may have died, said issue taking a parent's share per stirpes." Each of the two grandsons, Marshall and Henry, was in the events which happened to take two fifths, and Gwenderlyn one fifth. Then follows the important clause: "Out of the net income of the proportionate share of the trust estate held in trust for any child of my son or issue of a child, I direct that said trustees make such provision from time to time as they in their uncontrolled discretion may think necessary or advisable for the suitable maintenance and education of such child or issue thereof until such child or issue thereof shall be entitled under provisions hereafter contained to receive payments of income directly from said trustees. Such provision shall be paid over by said trustees from time to time to each such child or issue thereof or to the guardian or guardians of each child or issue thereof, or may be otherwise applied for the benefit of each such child or issue thereof as said trustees may think desirable. If and so far as the suitable maintenance or education of any such child or issue thereof shall from time o time appear to said trustees to be sufficiently provided for in other ways or from other sources said trustees shall refrain from making any provision therefor out of said trust estate." Subject to the directions respecting provision for maintenance and education of the three grandchildren "the net income of their respective shares" is to be accumulated until each grandchild attains twenty-five, when one half of the net income of their respective shares enhanced by accumulations is to be paid to them quarterly during their lives, with similar provisions as to the other moiety when each grandchild attains thirty-five. Subject to the above provisions, the trust estate is settled upon the issue of the grandchildren: on failure of all those trusts the estate is given to the testator's brothers and sisters.

It seems to me that each grandchild has a contingent interest in the trust estate. (1.) If he attains twenty-five he will be entitled to a vested life interest in one half the income of his proportionate share, including accumulations up to that date: (2.) if he attains thirty-five he will be entitled to a vested life interest in the remaining half of the income of his proportionate share, augmented by accumulations: (3.) he will also be entitled before attaining twenty-five to such income as the trustees in the honest exercise of their discretion think necessary or advisable for his suitable maintenance and education: (4.) if the trustees neglect or decline to exercise their discretion, I think the American Court might interpose and give relief. The 22nd clause of the will contains provisions which purport to deprive the grandchildren, even after attaining twenty-five, of any right to demand payment against the trustees. Such provisions are in my opinion of very doubtful effect.

It remains to consider whether there is a "possession" in America, in respect of which sums have been annually received in Great Britain and remitted from America. I think the trust fund is a "possession" in America. I cannot doubt that any income remitted from America to a grandchild after attainment of twenty-five would be taxable, although the grandchild has no interest in the capital. What is the position between twenty-one and twenty-five? If the trustees, in the honest exercise of their discretion, remit 1000*l.* a year to the grandchild, is that in any different position? I think not. When the discretion has been exercised by the trustees, and to the extent to which it has been so exercised, the grandchild is entitled to the portion of the income so remitted. The 1000*l.* a year so paid would be allowed to the trustees if the accounts of the trust estate were taken by the Court. I fail to appreciate the argument that it would be a voluntary gift, like an allowance made by a father to his son. The decision of the Court of Session in *Duncan's Executors* v. *Farmer* (1) is a direct authority to the contrary. That was not a case falling under Sched. E but under Sched D. It is irrelevant to point out that the discretion of the trustees might have been exercised differently.

What is the position before twenty-one, if during minority the trustees, in the honest exercise of their discretion, remit 1000*l.* a year "to the guardian," as they are authorized to do? The guardian is the legal hand to receive, but the money is not in equity her money. She is accountable for the money to the infants. If their interest was vested and not contingent, and the income was paid to her, this could not be doubted. But on principle I think whatever money a guardian receives as guardian is the infants' money and must be accounted for by the guardian as such.

Sect. 41 of the Act of 1842 makes a guardian having the direction, control, or management of the property or concern of an infant chargeable to income tax in like manner and to the same amount as would be charged if the infant were of full age. And see s. 92 of the Taxes Management Act, 1880.

The Commissioners held that Mrs. Drummond as guardian of the infants was liable to be assessed in respect of the remittances. Horridge J. has taken the same view. In my opinion his decision was correct, and this appeal should be dismissed with costs.

SIR SAMUEL EVANS, PRESIDENT. I have had an opportunity of reading and considering the judgment of the Master of the Rolls, and I agree entirely in its reasoning and its conclusion. Therefore, I do not wish to add anything.

---

(1) 5 Tax Cases, 417.

JOYCE J. I regret to say that in this case I do not see my way to agree with the conclusion which my brethren have arrived at. The question is whether an allowance for maintenance made, under a discretionary power, to the mother of certain infants at present residing with her in this country by the trustees in America of the will of her late husband's father, an American, whose estate is being administered there, is taxable in this country as being income of the infants. There is no question of taxing the mother personally as the recipient of the allowance. It is the infants who are sought to be taxed.

In the Court below it was held that the moneys remitted were in themselves "foreign possessions" within the meaning of that expression in the statute of 1842. This view was I think manifestly erroneous, and, as I understood the argument on the part of the Crown before us, it was not attempted to support it. It was also held in the Court below that the proportionate shares of the trust estate held—or rather described or referred to in the grandfather's will as being held—"in trust for the children" were as to each child a foreign possession, meaning I suppose a foreign possession of the child's. This view, when the terms of the will are examined, appears to me to be equally erroneous. These proportionate shares, though in some clauses of the will referred to as "held in trust for any child of my son or issue of a child," are not really held in trust for any child of the son, or in other words for any of these infants, but, speaking broadly, are directed to be accumulated until the child attains twenty-five; in which event, if and whenever it happens, the child will have a life interest in the income or a portion of the income of the accumulated fund. In the corpus—including the accumulated income—the child never takes anything. This accumulating fund is not now and possibly never may be a possession or property of the infant in any proper or fair sense of the term. It is certainly not so now, nor will it ever be unless or until the child, at present an infant, attains twenty-five. A merely future interest, a fortiori a mere future contingent interest which produces nothing to the owner while it remains future and contingent, cannot be taxable in my opinion under the Income Tax Acts.

If the allowances in question be taxable at all they are so only as being annual profits or gains under Sched. D in the Act of 1853. We have nothing to do with the schedules in the Act of 1842. Whatever may or may not now be the statutory force of the rules—which are merely rules as to modes of computation—in the Act of 1842, the schedules of that Act have been superseded and replaced by the schedules in the Act of 1853.

If I understand the matter rightly the annual Finance Act, or whatever it may be called, always provides that income tax shall be charged at a certain rate; at present 1*s.* 2*d.* in the pound. Then s. 26 of the Finance Act of 1896 provides: "Where this or any other Act enacts that income tax shall be charged in any year at any rate, there shall be charged, levied and paid during that year in respect of all property, profits and gains respectively described or comprised in the several Schedules A, B, C, D and E in the Income Tax Act, 1853, the tax at that rate" and so on, explaining more fully how the rate is levied. This sends us back not to the Act of 1842 but to the Act of 1853, s. 2, which provides: "For the purpose of classifying and distinguishing the several properties, profits and gains for and in respect of which the said duties are by this Act granted, and for the purposes of the provisions for assessing, raising, levying and collecting such duties respectively, the said duties shall be deemed to be granted and made payable yearly for and in respect of the several properties, profits and gains respectively described or comprised in the several schedules contained in this Act and marked respectively A, B, C, D, and E." Then I pass over Scheds. A, B, C, and E, which have nothing to do with this case, and the provision in respect of Sched. D is this: "For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere"; and then lower down, passing over the intermediate words which are immaterial, "And for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act."

Now it was not and could not be contended that any of the Scheds. A, B, C, or E comprises or refers to the allowances in question. If chargeable at all they can only be so under Sched. D of the Act of 1853, and I understand it to be claimed by the Crown that these allowances are annual profits or gains arising or accruing to these infants residing in the United Kingdom from property, which must be property of theirs, situate elsewhere than in the United Kingdom. The only income taxable under this schedule is, so far as material to the present case, "annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatsoever"—which I understand to be property of the persons proposed to be taxed —"whether situate in the United Kingdom or elsewhere."

Now, as I understand, it could not be disputed that mere voluntary allowances or payments, whether to an infant or to an adult, are not taxable as income of the infant or recipient, and for this reason: they are not annual profits or gains of any property of the infant or recipient, nor indeed are they "annual profits or gains" at all in my opinion within the meaning of that expression in the Act of 1853. If the allowances now in question had been made by the testator himself, the grandfather of the infants, during his life to their mother, his daughter-in-law, such allowances would not have been taxable as income—annual profits or gains—of the infants, nor of the mother to whom they are made in repayment of her expenditure upon the infants. Still less, in my opinion, could it have been contended that payments made by the testator directly in discharge of bills for expenses incurred on behalf or for the benefit of the infants would have been taxable as income of theirs.

In my opinion the securities and investments, whatever they may be, from the income of which the money is derived which provides the allowances now in question, are in no sense property or possessions of the infants. Such income does not and never will belong to the infants under any circumstances; it is not theirs even contingently. Their future contingent life interests do not produce any income at present and may never arise at all. That the liability of any of the infants to be taxed in respect of these discretionary allowances for maintenance should in any way depend upon the circumstance of a future contingent life interest being limited to such infants in the accumulated fund would to my mind be an absurdity. If the infants be taxable at all in respect of the allowances they must I think be equally so, though no future contingent life interests were limited to them in any share under the grandfather's will. The fact of there being limitations of these future contingent life interests to the infants is in my opinion immaterial to the question the Court has now to decide. Considering the whole of that will I do not agree, nor indeed do I think it was contended before us, that any Court in America—and it is only the Courts in America that would have jurisdiction—would or could at the instance of the infants or any one else compel the trustees to exercise their uncontrolled discretionary powers of maintenance under this will. At all events it is quite clear, I think, that the trustees could not be compelled to make any such allowance in money as they are doing to the mother. If they were bound to exercise the power, they might either make an allowance to the guardian or they might otherwise apply the money that they thought proper to apply for the benefit of such child or issue thereof as they might think desirable, making the payments direct. They might if they pleased refrain altogether from exercising their discretionary power, and, as I say, at all events if they chose they might defray all bills or expenses by direct payment to the persons with whom such bills might have been incurred on behalf of the infants in respect of their maintenance and education. No Court could, in my opinion, hold that such payments were taxable as income of the infants, nor indeed would they pass through the hands either of the infants or of their guardian.

Again, if the trustees make an allowance to the mother they are entitled to prescribe and require an undertaking from her as to how the money shall be expended. The money when paid to her is not, in my opinion, free income of the infants which she as the guardian might dispose of as she pleased or which she would be bound to deal with and account for according to the general law with respect to the income of a ward received by its guardian.

My conclusion is that the allowances in question are not annual profits or gains arising or accruing to the infants from any property of theirs in the United Kingdom or elsewhere, nor, indeed, in my opinion, are they annual profits or gains arising or accruing to them at all within the meaning of the Act of 1853.

I have one other observation to make. It is a well-established rule that the subject is not to be taxed without clear words for that purpose (see the observation of Parke B. in *In re Micklethwait* (1)), and, therefore, if the Crown cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law he may be. That is what Lord Cairns says in *Partington* v. *Attorney-General.* (2)

Upon the whole I am of opinion that the decision of the Court below in this case cannot be supported and that this appeal ought to be allowed.

Appeal dismissed.

Solicitors for appellant: *Boodle, Hatfield & Co.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

G. A. S.

C. A.
1914
Jan. 22, 23.

[IN THE COURT OF APPEAL.]

LONDON COUNTY COUNCIL *v.* CHURCHWARDENS OF THE PARISH OF ST. BOTOLPH, BISHOPSGATE.

Ecclesiastical Law—Church Rate—Rate authorized by Local Act—In Consideration of the Abolition of Tithes — Good or Valuable Consideration—Rate partly for Ecclesiastical and partly for other Purposes — Compulsory Church Rate Abolition Act, 1868 (31 & 32 *Vict. c.* 109), *ss.* 1, 2, 5, 10.

By a local Act, 6 Geo. 4, c. clxxvi., after reciting that it would be beneficial to the inhabitants of a parish in the city of London that an annual stipend should be paid to the rector of the parish in lieu and full satisfaction of all tithes or payments in lieu of tithes within the parish, it was provided in s. 1 that the churchwardens of the parish should pay to the rector for the time being a fixed annual sum in lieu, satisfaction, and discharge of all tithes or payments in lieu of tithes to which the rector was entitled within the parish. Sect. 7 abolished such tithes and payments in lieu of tithes; and s. 14 required the churchwardens and inhabitants in each year to make and sign a sufficient assessment, to be called "the church rate," upon the occupiers of lands and tenements within the parish for raising the said annual sum and such further sum as should be necessary for repairing and keeping in repair the parish church and churchyard, and for the payment of all necessary and proper salaries and disbursements relative to the parish church and churchyard, and the costs of collecting the rate.

---

(1) (1855) 11 Ex. 452, 456.

(2) L. R. 4 H. L. 100, 123.

By s. 1 of the Compulsory Church Rate Abolition Act, 1868, no proceedings shall be taken to enforce payment of any church rate made in any parish or place. By s. 2, where under a general or local Act a rate may be made and levied partly for ecclesiastical and partly for other purposes, such rate shall be made, levied, and applied for such last-mentioned purposes only. By s. 5, "This Act shall not affect any enactment in any private or local Act of Parliament under the authority of which church rates may be made or levied in lieu of, or in consideration of the extinguishment or of the appropriation to any other purpose of, any tithes, customary payments, or other property or charge upon property, which tithes, payments, property, or charge, previously to the passing of such Act, had been appropriated by law to ecclesiastical purposes as defined by this Act, or in consideration of the abolition of tithes in any place, or upon any contract made, or for good or valuable consideration given, and every such enactment shall continue in force in the same manner as if this Act had not passed." By s. 10, "In this Act 'ecclesiastical purposes' shall mean the building, rebuilding, enlargement, and repair of any church or chapel, and any purpose to which by common or ecclesiastical law a church rate is applicable, or any of such purposes"; and "'church rate' shall mean any rate for ecclesiastical purposes as hereinbefore defined":—

Held, that the "church rate" specified in s. 5 of the Act of 1868 was not limited to a church rate for ecclesiastical purposes as defined in s. 10, but meant the church rate as made or levied under the provisions of the private or local Act; that the church rate under the Act, 6 Geo. 4, c. clxxvi., which was a church rate not only for ecclesiastical purposes but also for other purposes, namely, the rector's stipend, was authorized to be made and levied "in consideration of the abolition of tithes"; and that therefore the whole rate was preserved from abolition by s. 5, and not merely that part of it which was applicable to payment of the rector's stipend.

Appeal from the decision of a Divisional Court upon a case stated under s. 11 of the Quarter Sessions Act, 1849 (12 & 13 Vict. c. 45), after notice of appeal to the quarter sessions for the city of London against a church rate for the parish of St. Botolph, Bishopsgate, in the city of London.

1. On October 10, 1912, the churchwardens and inhabitants of the parish of St. Botolph, Bishopsgate, made a rate described as follows in the title thereof:—Parish of St. Botolph, Bishopsgate, in the city of London—Tithe or Church rate book—Rate under the local Act (6 Geo. 4, c. clxxvi., affecting the parish of St. Botolph, Bishopsgate, in the city of London) for provision

for the rector's stipend and for other purposes authorized by that Act, ... after the rate of one penny in the pound which is estimated to meet all the expenses for the above purposes which will be incurred before March 25 next.

2. In the rate the London County Council were assessed as the owners and occupiers of a fire brigade station in the parish of the gross estimated rental of 1800*l.*, and of the rateable value of 1500*l.*, the amount of the rate at 1*d.* in the pound being 6*l.* 5*s.*

3. The rate was made for the purposes hereunder stated. The amount required for each of such purposes is specified against such purpose:—

	£	*s.*	*d.*
Rector—two quarters' stipend . .	490	0	0
Clerk under Tithe Act	50	0	0
Collector	65	0	0
Organist	40	0	0
Beadle	26	0	0
Sexton	35	15	0
Sextoness	19	10	0
Water for church and churchyard . .	14	0	0
Winding church clock for the year . .	14	14	0
Printing and stationery	14	0	0
Labour, &c., in churchyard . . .	10	0	0
Tuning organ for the year . . .	14	14	0
Electric light	35	0	0
Coals, coke, wood and gas	12	0	0
Petty payments	10	0	0

4. The said Act, 6 Geo. 4, c. clxxvi., is intituled "An Act for extinguishing tithes, and customary payments in lieu of tithes, within the parish of Saint Botolph-without-Bishopsgate in the Liberties of the City of London; and for making compensation to the rector for the time being in lieu thereof." By s. 1, after reciting that "Whereas the Lord Bishop of London for the time being is patron of the rectory of the parish church of Saint Botolph-without-Bishopsgate within the Liberties of the City of London, and the Right Reverend Charles James Blomfield, Doctor in Divinity, Lord Bishop of Chester, is the present rector of the said parish: And whereas it will be beneficial to the

inhabitants of the said parish that a certain annual stipend should from henceforth be paid to the rector of the said parish for the time being in lieu and in full satisfaction of all tithes, or payments in lieu of tithes, within the said parish, in manner and under the regulations hereinafter mentioned; but such beneficial purpose (notwithstanding that the said patron and Ordinary and the said rector are consenting thereto) cannot be effected without the aid and authority of Parliament," provides that "the churchwardens of the said parish for the time being shall from time to time for ever hereafter pay, or cause to be paid, to the rector for the time being of the said parish, or to such person as he shall appoint to receive the same, one annual sum of 2500*l.* of lawful money of Great Britain in lieu, satisfaction, and discharge of all tithes, or payment in lieu of tithes, to which such rector is entitled or might by law claim as such rector as aforesaid within the same parish . . . ." By s. 7, "From and immediately after the 24th day of June, 1825, all tithes, and payments in lieu of tithes, which the said rector for the time being might otherwise have had by law, or to which the rector for the time being is entitled or might claim within the said parish, shall cease and be for ever extinguished . . . ." By s. 14, "And to the end that the said churchwardens may be enabled to raise and pay the said yearly sum of 2500*l.* in manner aforesaid, be it further enacted, that it shall be lawful for the said churchwardens, or any ten inhabitant householders of the said parish, and they are hereby required, once or oftener in every year, as they shall see occasion, to convene a meeting of the inhabitants of the said parish in the said parish church . . . . and at which vestry meetings the said churchwardens and inhabitants, or any ten of the said inhabitants in case the said churchwardens or either of them shall neglect or refuse, shall proceed to make and sign a sufficient assessment, to be called 'the church rate,' upon all persons, inhabitants and occupiers of lands, tenements, hereditaments, and premises within the said parish, except the said rector for the time being, for raising from time to time the said annual sum of 2500*l.*, and such further sum of money as shall be necessary for repairing and keeping in repair the church of the said parish, and the

C. A.
1914

LONDON COUNTY COUNCIL v. ST. BOTOLPH, BISHOPSGATE, CHURCHWARDENS.

churchyard belonging to the same, and for the payment of all necessary and proper salaries and disbursements relative to the said parish church and churchyard, and also all costs, charges, and expenses incident to or attendant upon the collecting the same rate, and the carrying the purposes of this Act into execution . . . . and any costs, charges, or expenses which may be incurred in or about any proceedings on behalf of the said rector for recovering the said yearly sum of 2500*l.*, or any part thereof . . . ." Sect. 31, after reciting that the said annual sum of 2500*l.* was based upon the average price of wheat within the city of London for the preceding ten years, provided for the increase or decrease of the annual sum every ten years according to the average price of wheat within the city of London for the preceding ten years.

5. The churchwardens contended and the London County Council denied that the tithes, customary payments, or other property or charge upon property, in lieu of which the church rate aforesaid was authorized to be levied, had previously to the passing of the said Act been appropriated by law to ecclesiastical purposes as defined by s. 10 of the Compulsory Church Rate Abolition Act, 1868. The salaries, payments, and other disbursements which were paid out of the church rate previously to the passing of 6 Geo. 4, c. clxxvi., were of the character and description shewn in the accounts of the churchwardens for the year ending May 31, 1822. (1)

6. The Compulsory Church Rate Abolition Act, 1868 (31 & 32 Vict. c. 109), recites that "Whereas church rates have for some years ceased to be made or collected in many parishes by reason of the opposition thereto, and in many other parishes where church rates have been made the levying thereof has given rise to litigation and ill feeling : And whereas it is expedient that the power to compel payment of church rates by any legal process should be abolished."

Sect. 1 : "From and after the passing of this Act no suit shall be instituted or proceeding taken in any ecclesiastical or other Court, or before any justice or magistrate, to enforce or compel the payment of any church rate made in any parish or place in England or Wales."

---

(1) These accounts shewed a large number of payments, as, for instance, to pew opener, organist, organ blower, bellringers, and for gas candles, and water rate, and for keeping the church and churchyard in proper order.

Sect. 2: "Where in pursuance of any general or local Act any rate may be made and levied which is applicable partly to ecclesiastical purposes and partly to other purposes, such rate shall be made, levied, and applied for such last-mentioned purposes only, and so far as it is applicable to such purposes shall be deemed to be a separate rate, and not a church rate, and shall not be affected by this Act . . . ."

Sect. 5.: "This Act shall not affect any enactment in any private or local Act of Parliament under the authority of which church rates may be made or levied in lieu of, or in consideration of the extinguishment or of the appropriation to any other purpose of, any tithes, customary payments, or other property or charge upon property, which tithes, payments, property, or charge, previously to the passing of such Act, had been appropriated by law to ecclesiastical purposes as defined by this Act, or in consideration of the abolition of tithes in any place, or upon any contract made, or for good or valuable consideration given, and every such enactment shall continue in force in the same manner as if this Act had not passed."

Sect. 10: "In this Act 'ecclesiatical purposes' shall mean the building, rebuilding, enlargement, and repair of any church or chapel, and any purpose to which by common or ecclesiastical law a church rate is applicable, or any of such purposes:

"'Church rate' shall mean any rate for ecclesiastical purposes as hereinbefore defined."

7. Prior to the Act of 6 Geo. 4, c. clxxvi., aforesaid the rector of the parish of St. Botolph, Bishopsgate, for the time being had the right under 37 Hen. 8, c. 12, to levy a tithe upon every occupier equal to 2*s.* 9*d.* in the pound, whereas the present church rate levied under the Act of 6 Geo. 4, c. clxxvi., is a rate of 2*d.* or thereabouts in the pound. From the time of the passing of 6 Geo. 4, c. clxxvi., until the objection made on behalf of the London County Council in the present case only one ratepayer, the London Missionary Society, has objected to

pay the rate. This was shortly after 1868, and upon the objection being heard before a Court of summary jurisdiction, it was held that the said ratepayer was liable for the said rate. But for this exception the church rate in question has been regularly paid without objection or question by the ratepayers liable to pay the same, and the London County Council and their predecessors, the Metropolitan Board of Works, have paid the said rate for over forty years.

8. The London County Council contended—

(1.) That the said churchwardens and inhabitants had by reason of the provisions of the Compulsory Church Rate Abolition Act, 1868, no power to make any rate or assessment for any of the purposes specified in paragraph 3 hereof except the raising of the rector's stipend together with the costs of collecting a rate made for that purpose.

(2.) That (apart from the raising of the rector's stipend together with such costs as aforesaid) church rates authorized to be made or levied by the provisions of 6 Geo. 4, c. clxxvi., were not authorized to be made or levied in lieu of or in consideration of the extinguishment or of the appropriation to any other purpose of any tithes, customary payments, or other property or charge upon property, which previously to the passing of the said Act had been appropriated by law to ecclesiastical purposes, as defined by s. 10 of the Compulsory Church Rate Abolition Act, 1868, or in consideration of the abolition of tithes, or upon any contract made, or for good or valuable consideration given.

(3.) That the said rate made on October 10, 1912, was made for other purposes besides the raising of the rector's stipend and of such costs as aforesaid, and did not specify how much of the said rate was made for the raising of the rector's stipend and of such costs as aforesaid and was bad.

(4.) In the alternative that so much of the said rate as was made for purposes other than the raising of the rector's stipend and of such costs as aforesaid was bad.

9. The churchwardens contended—

(1.) That the said churchwardens were authorized by s. 14 of 6 Geo. 4, c. clxxvi., to make and levy a rate or assessment to be called " the church rate " for all or any of the purposes therein mentioned, and that the purposes for which the rate now appealed from had been made were within the said section of the said Act.

(2.) That the rates levied under s. 14 of 6 Geo. 4, c. clxxvi., were not affected by the Compulsory Church Rate Abolition Act, 1868, by virtue of s. 5 thereof on the following grounds :—

(*a*) The said rates were in lieu of or in consideration of the extinguishment of tithes, and/or other customary payments, and/or other property or charge upon property, which previously to the passing of 6 Geo. 4, c. clxxvi., had been appropriated by law to ecclesiastical purposes as defined by s. 10 of the Compulsory Church Rate Abolition Act, 1868.

(*b*) That the said rates were made and levied in consideration of the abolition of tithes.

(*c*) In the alternative that the said rates were made and levied upon a contract, or for good or valuable consideration given.

The question for the opinion of the Court was whether the contentions of the London County Council or of the churchwardens were correct.

If the Court should be of opinion that the first and third contentions of the London County Council were correct, the rate made on October 10, 1912, was to be amended by striking out therefrom the entry relative to them or to be quashed as to the Court should seem fit.

If the Court should be of opinion that the first and fourth contentions of the London County Council were correct, the Court should make such order as they thought fit.

If the Court should be of opinion that the contentions of the churchwardens were correct, the rate was to stand.

The Divisional Court (Darling and Rowlatt JJ., Atkin J. dissenting) entered judgment for the London County Council. Darling and Rowlatt JJ. held that the rate made and levied under s. 14 of 6 Geo. 4, c. clxxvi., was divisible into two parts, one part being a rate for ecclesiastical purposes and the other part a rate for purposes other than ecclesiastical; that the rate, so far as it was a rate for purposes other than ecclesiastical, was preserved by s. 2 of the Compulsory Church Rate Abolition Act, 1868, and that, so far as it was a rate for ecclesiastical purposes, it merely took the place of the old customary church rate, and was not made or levied in consideration of the abolition of tithes, and that therefore it was not preserved by s. 5 of the Compulsory Church Rate Abolition Act, 1868. Atkin J. held that the statutory rate made and levied under s. 14 of 6 Geo. 4, c. clxxvi., was one indivisible rate, though the money to be obtained by it was made applicable to various purposes, and that the consideration for that single statutory rate was the abolition of tithes; that s. 5 of the Compulsory Church Rate Abolition Act, 1868, was independent of s. 2; and that the whole rate was preserved by s. 5.

The churchwardens of St. Botolph appealed to the Court of Appeal.

Macmorran, K.C., and *Sylvain Mayer, K.C.*, for the churchwardens. The object of the local Act, 6 Geo. 4, c. clxxvi., as appearing from its title and from the preamble to s. 1, was to extinguish tithes and customary payments in lieu of tithes in the parish of St. Botolph, and to give to the rector for the time being of the parish a fixed annual stipend of 2500*l.* in satisfaction thereof. Sect. 1 required the churchwardens of the parish to pay to the rector this annual sum "in lieu, satisfaction, and discharge of all tithes, or payment in lieu of tithes, to which such rector is entitled or might by law claim as such rector as aforesaid within the same parish"; and s. 7 extinguished for ever all tithes and payments in lieu of tithes within the parish. To enable the churchwardens to make this payment to the rector, s. 14 empowered and required them to make an assessment, to be called "the church rate," upon the occupiers of houses within the parish sufficient to pay not only the 2500*l.* but also the salaries and disbursements connected with the church and churchyard, which latter sums had formerly been raised by a customary church rate. This "church rate" authorized by the Act of George IV. was levied for all those purposes, and it was authorized to be levied in consideration of the extinguishment or abolition of tithes and payments in lieu of tithes in the parish. The rate under s. 14 is one indivisible rate and cannot be separated into two parts. The

Compulsory Church Rate Abolition Act, 1868, abolished compulsory church rates generally. There are two exceptions. Under s. 2 if a rate is, in pursuance of any Act, applicable partly to ecclesiastical and partly to other purposes, it shall, so far as it is applicable to those other purposes, be deemed to be a separate rate, and "not a church rate," and shall not be affected by the Act. Therefore in such a case, though the rate is in reality a church rate, it is to be "deemed" to be a separate rate and not a church rate so far as it is applicable to non-ecclesiastical purposes. The church rate authorized to be levied under s. 14 of the local Act is called in that section "the church rate" and is one indivisible rate. It comes within s. 5 of the Act of 1868, which enacts a further exception, and not within s. 2. The rate is a church rate made and levied "in consideration of the abolition of tithes" in the parish. It may also come within the words "upon any contract made, or for good or valuable consideration given." The "contract made" or the "consideration given" must be found in or be gathered from the Act which authorizes the levying of the church rate: *Reg.* v. *Vestry of St. Marylebone.* (1) The abolition of tithes was the consideration for the whole rate, and not only for that part of the rate which is applicable to the rector's stipend. The whole rate is therefore exempted by s. 5 of the Act of 1868 from the operation of that Act.

In *Watson* v. *Vestry of All Saints, Poplar* (2) it was held that the rate, which was one for ecclesiastical and other purposes, was not made in lieu of or in consideration of the extinguishment or abolition of tithes within the meaning of s. 5 of the Act of 1868, and that the rate came within s. 2, and was not enforceable so far as it was a rate for ecclesiastical purposes. That case therefore stands on a different footing from the present case. In *Bell* v. *Bassett* (3) Day J. held that a similar rate was a valid rate as being one made "upon a contract made, or for good or valuable consideration given," within s. 5 of the Act of 1868. The case of *Reg.* v. *Churchwardens of St. Matthew, Bethnal Green* (4) is a similar case to the present. In that case also the rate was a composite rate, applicable partly to ecclesiastical purposes and partly to other purposes, and the Court held that the rate was levied in consideration of the extinguishment of tithes and other customary payments, and came within the exemption in s. 5 of the Act of 1868. That decision was affirmed in the House of Lords. (1) The whole rate is therefore preserved by s. 5 of the Act of 1868. [*Ex parte Stafford* (2) was also referred to.]

---

(1) [1895] 1 Q. B. 771.

(2) (1882) 46 L. T. 201.

(3) (1882) 52 L. J. (Q.B.) 22.

(4) (1883) 50 L. T. 65.

Ryde, K.C., and *Konstam*, for the London County Council. It is admitted that this rate is valid so far as it is applicable to the rector's stipend, but it is submitted that it is not valid so far as it is applicable to ecclesiastical purposes. Before the Act of 6 Geo. 4, c. clxxvi., the tithes and payments in lieu of tithes went to the rector as his stipend and a church rate was by custom levied on the parishioners for the necessary repair and expenses of the church. The object of the Act was to abolish tithes and payments in lieu of tithes and to substitute therefor a fixed annual sum of 2500*l.* payable to the rector, which was probably smaller in amount than the uncertain sum formerly received by him. The surrender of the tithes and payments in lieu of tithes was the consideration for the annual payment to the rector. Sect. 1 imposed upon the churchwardens the obligation of paying the rector this annual sum, and s. 14 provided the machinery necessary for collecting this sum and at the same time the sum necessary for church expenses. This was done by means of a new statutory rate which was to be levied for the purpose of raising the annual sum payable to the rector and the church expenses which were formerly collected from the parishioners by the customary rate. Therefore the consideration as between the rector and the parishioners was this. The rector was to receive a smaller but fixed annual stipend, and the parishioners were exempted from payment of tithes. The burden on the parishioners as a class remained substantially the same as before, but the machinery for collecting the sums due from them for the rector's stipend and the church expenses was altered. The statutory church rate, so far as it was made and levied for purposes other than the rector's stipend, that is, for ecclesiastical purposes, was not made or levied in consideration of the abolition of tithes. The preamble of the Compulsory Church Rate Abolition Act, 1868, shews that in many parishes the collection of church rates had given rise to litigation and ill feeling, and s. 1 accordingly abolished "church rates." Sect. 10 of the Act defines "church rate" as meaning "any rate for ecclesiastical purposes as hereinbefore defined"; and "ecclesiastical purposes" as meaning "the building, rebuilding, enlargement, and repair of any church or chapel, and any purpose to which by common or ecclesiastical law a church rate is applicable, or any of such purposes." Sect. 1, therefore, read in the light of that definition abolished church rates, that is to say, rates for ecclesiastical purposes only. The rector's stipend is not an ecclesiastical purpose within that definition, and therefore the composite rate made under 6 Geo. 4, c. clxxvi., is not as a whole a "church rate" within the meaning of the Act of 1868. It is a composite rate within s. 2, which provides that "where in pursuance of any general or local Act any rate"—not "any church rate"—"may be made and levied which is applicable partly to ecclesiastical purposes and partly to other purposes, such rate shall be made, levied, and applied for such last-mentioned purposes only, and so far as it is applicable to such purposes shall be deemed to be a separate rate, and not a church rate, and shall not be affected by this Act." That section deals with a composite rate, and the effect is to bring that part of the rate which is levied for ecclesiastical purposes into s. 1 and thus to abolish that part only. The words "and not a church rate" are not wanted, because by the definition clause the rate is not a church rate. Then s. 5 enacts that the Act is not to affect any enactment in any private or local Act under the authority of which "church rates" may be made or levied as therein stated. The words "church rates" in this section must be read in the light of the definition in s. 10, and if so read they mean rates made for ecclesiastical purposes only. A rate partly for ecclesiastical and partly for other purposes is not within s. 5. The rate in the present case is a rate partly for ecclesiastical purposes and partly for the rector's stipend, and is therefore not a "church rate" within the Act of 1868. It comes within s. 2 and not within s. 5. Accordingly, even if the rate under the Act of George IV. was made in consideration of the abolition of tithes it is not a "church rate" within the Act. In this view all the provisions of the Act work harmoniously. Tithes are left untouched by the Act, and if a rate for ecclesiastical purposes has taken the place of tithes, that rate is to be left standing. If the words "church rates" in s. 5 mean rates made for ecclesiastical and other purposes, then it might happen that, though by far the larger part of the rate was levied for ecclesiastical purposes, and a very small part for the rector's stipend in consideration of his having surrendered some of the tithes, the whole would be preserved. That would retain the very grievance which the Act was intended to remove. An illustration of the working of s. 5 may be given. If a local Act had appropriated tithes to ecclesiastical purposes, such as the building of a church, and a subsequent Act abolished those tithes and substituted a rate for them, that rate would be a "church rate" within s. 5, as the rate would have been made and levied "in lieu of, or in consideration of the extinguishment of, tithes which had been appropriated by law to ecclesiastical purposes." "In consideration of the abolition of tithes" also refers to tithes of the same kind, namely, those which were appropriated by law to ecclesiastical purposes. The whole section is dealing with a "church rate," that is, a rate for ecclesiastical purposes which took the place of tithes, which tithes had been appropriated by law to ecclesiastical purposes or had been voluntarily given up by the rector for ecclesiastical purposes. This rate was not authorized to be made and levied in consideration of the extinguishment or abolition of tithes which were applicable to ecclesiastical purposes.

---

(1) (1885) 53 L. T. 634.

(2) (1870) Noted in Prideaux on Churchwardens, 16th ed., pp. 111, 112.

With regard to the authorities, *Watson* v. *Vestry of All Saints, Poplar* (1) is in favour of the view now put forward, as the Court held that the rate was not made in lieu or in consideration of the extinguishment or the abolition of tithes. Field J. there treated the rate dealt with in s. 5 of the Act of 1868 as a rate for ecclesiastical purposes. (2) In *Reg.* v. *Churchwardens of St.*

---

(1) 46 L. T. 201.

(2) Ibid. at p. 204.

Matthew, Bethnal Green (1) the point was never taken, as it might have been, that a composite rate was not a "church rate" within s. 5 of the Act of 1868 because of the definition in s. 10. The Court did not express any dissent from the decision in *Watson* v. *Vestry of All Saints, Poplar.* (2) Nor was the point taken in *Bell* v. *Bassett.* (3) There is no authority against the view contended for. Therefore s. 5 of the Act of 1868 does not apply, and s. 2 applies, and that portion of the rate which is applicable to ecclesiastical purposes is bad.

Macmorran, K.C., in reply. The preamble to the local Act makes it clear that the rector gave up the tithes in consideration for the annual sum of 2500*l.* to be raised by a rate, and the Act allowed the churchwardens to include in that rate a sum for church expenses. The giving up of the tithes was the one consideration for the whole rate. With regard to the meaning of "church rates" in s. 5 of the Act of 1868 the point has never been taken before, though it might have been taken in other cases. Indeed in *Reg.* v. *Churchwardens of St. Matthew, Bethnal Green* (4) counsel for the appellants must have appreciated the point because he said that "Sect. 5 only applies where by a private or local Act a church rate pure and simple could be made." It is impossible to suppose that the point can have escaped observation in a case which came before three Courts, being ultimately decided in the House of Lords. (5) Lord Macnaghten's observation in *Fulham Parish* v. *Woolwich Union* (6)—that "I should rather hesitate before I could come to the conclusion that a point which Lord Herschell missed and Lord Halsbury overlooked was in any case a safe and sufficient ground of decision"—is in point. Sect. 5 must be construed as referring to the statutory church rates authorized by a private or local Act to be levied. The Act of 6 Geo. 4, c. clxxvi., authorized a "church rate" to be levied in consideration of the abolition of tithes, and s. 5 of the Act of 1868 exempts from the operation of the Act the "church rate" as described in the private or local Act. Therefore s. 5 applies.

(1) 50 L. T. 65.
(2) 46 L. T. 201.
(3) 52 L. J. (Q.B.) 22.
(4) 50 L. T. 65, at p. 70.
(5) 53 L. T. 634.
(6) [1907] A. C. 255, at p. 261.

VAUGHAN WILLIAMS L.J. In my opinion the judgment of Atkin J. is right, and I entirely agree with it and with the reasons which he has given.

The main point which has been made before us on behalf of the London County Council was not, so far as I can see, very much relied upon in the Divisional Court. The point is that the definition of "church rate" in s. 10 of the Compulsory Church Rate Abolition Act, 1868, must be read into s. 5, with the result that the only "church rates" preserved from abolition by that section are those which are applicable to ecclesiastical purposes as defined in s. 10, thus materially limiting the rights of the churchwardens under the statutory agreement of 1825 when tithes were abolished in the parish. The preamble to the Act of 1868 is as follows: "Whereas church rates have for some years ceased to be made or collected in many parishes by reason of the opposition thereto, and in many other parishes where church rates have been made the levying thereof has given rise to litigation and ill feeling: and whereas it is expedient that the power to compel payment of church rates by any legal process should be abolished." Sect. 1 accordingly abolishes compulsory church rates. That is followed by s. 2, and I read the marginal note, because the interpretation which I place upon the section agrees very much with the marginal note. That note is: "Saving of rates called church rates, but applicable to secular purposes." If s. 2 had stood alone, the London County Council would have had a stronger case; but s. 2 is followed by s. 5. Here again I will read the marginal note to s. 5: "Not to affect enactments in local Acts, etc., where rates are made for purposes herein named." By s. 10, "'Church rate' shall mean any rate for ecclesiastical purposes as hereinbefore defined." It is said that s. 5 does not apply unless the church rate is a rate for ecclesiastical purposes only, and that if the rate is for ecclesiastical purposes and for other purposes also—what is called a composite rate—it is not a "church rate" within s. 5, but is dealt with under s. 2. In my opinion it is not right to apply the definition of "church rate" in s. 10 to the words "church rate" in s. 5. Those words must be read in the sense in which they are used in the private or local Act. I will now state the grounds upon which I think that the exemption contained in s. 5 is applicable to this case. That section states a number of conditions each of which is a separate and independent condition, and any one of which is sufficient to effect the purpose of s. 5. Sect. 5 provides that "this Act shall not affect any enactment in any private or local Act of Parliament under the authority of which church rates may be made or levied in lieu of, or in consideration of the extinguishment or of the appropriation to any other purpose of, any tithes, customary payments, or other property or charge upon property, which tithes, payments, property, or charge, previously to the passing of such Act, had been appropriated by law to ecclesiastical purposes as defined by this Act,"—that is one case—"or in consideration of the abolition of tithes in any place,"—that is the second case—"or upon any contract made,"—that is the third case—"or for good or valuable consideration given,"—that is the fourth case—"and every such enactment shall continue in force in the same manner as if this Act had not passed." These are all separate events on the happening of any one of which s. 5 would come into operation, and would exempt the rates dealt with in the private or local Act from abolition by the general Act.

In my opinion this is the case of a church rate authorized by the Act of 6 Geo. 4, c. clxxvi., to be levied "in consideration of the abolition of tithes." I also think that there was "good or valuable consideration given." In these circumstances s. 5 of the Act of 1868 comes into operation, and notwithstanding the provisions of s. 2 saves this rate from abolition. As I read the judgments of the majority of the learned judges in the Divisional Court, they say that this rate, which seems to me to be one rate authorized to be made and levied for one consideration, must be dealt with as if it were two rates, one for one purpose and one for another; that s. 2 is the section which applies to such a rate; and that the portion of the rate for the rector's stipend is preserved by that section, but not the other part of the rate. That shews the difficulty of construing those words in such a way as to justify a decision in favour of the London County Council, inasmuch as it is necessary to say that one rate made for one consideration is to be treated as two rates. I cannot adopt that view.

We have had a number of authorities cited to us, but there are none which support the contention of the London County Council. In *Watson* v. *Vestry of All Saints, Poplar* (1) there may be a few observations which seem to support that contention, but when the facts of the case are looked at it becomes apparent that the language cannot properly be applied to the facts of this case. In my opinion the appeal ought to be allowed.

Kennedy L.J. Having in view the judgments of the two learned judges who formed the majority in the Court below, and the argument which has been addressed to us, I cannot say that I think the case is free from difficulty. At the same time I have come to the conclusion that the judgment of Atkin J. is right.

The Compulsory Church Rate Abolition Act, 1868, was undoubtedly passed, as the preamble shews, for the purpose of abolishing compulsory payment of church rates, which had given rise to litigation and ill feeling. That is the main object of the Act. At the same time Parliament had to consider the case of a rate levied partly for ecclesiastical purposes and partly for other purposes, because it was only in so far as the rate was levied for ecclesiastical purposes that there had been objection to pay it. It was accordingly provided in s. 2 that, where in pursuance of any general or local Act any rate was made and levied partly for ecclesiastical and partly for other purposes, so far as it was applicable to such last-mentioned purposes it was to be deemed to be a separate rate and not a church rate, and should not be affected by the Act. Sect. 2 is what I may call the dominant section of the Act so far as regards the treatment of a rate which is not exclusively levied for ecclesiastical purposes. Parliament had also to consider cases of possible injustice arising from the fact that, while church rates generally might be leviable under the common law, or by the conjoint force of common law and ecclesiastical law, there were cases in which the church rate was levied under and by virtue of statutory enactments, some of them of considerable antiquity and some of them comparatively modern. It is plain that an injustice would be done by abolishing the church rate where the rate was authorized

(1) 46 L. T. 201.

to be levied under the statutory enactment for good consideration given by the persons who exchanged one form of payment for another. A burden might have been taken off the shoulders of the persons who were made liable to pay the church rate, and in so far as that state of things existed, it would be unfair to ignore the fact that those who were seeking to enforce the church rate had, through their predecessors, given good consideration for it in some form or other. Approaching the case from that standpoint it appears to me that, if the view which was adopted in the Court below is right, a strange distinction is drawn between the case of what is called a composite rate and the case of a rate levied solely for ecclesiastical purposes. If by the bargain embodied in a local Act the rate thereby imposed for good consideration was a rate which was to be made and levied both for ecclesiastical purposes and for other purposes, I should have thought there would have been not less but more ground for equity of treatment than if it had been a rate for ecclesiastical purposes only. On principle, therefore, in approaching s. 5 of the Act of 1868 I am unable to share the view which apparently governs the decision of Darling J. and Rowlatt J., that we ought to treat that section as dealing only with a church rate which has not already been, so to speak, dealt with by s. 2. Sect. 2 recognizes that there are cases in which the church rate is to be treated as separable, one part remaining an enforceable rate and the other part not. Sect. 5 recognizes the existence of rates with which it would be unjust to interfere, because they were made under parliamentary sanction and were leviable in lieu of some other burden or for good consideration given, and it exempts them from the operation of the Act. If the view of the majority of the Court below were right, the result would be that if there was a local Act which authorized for good consideration the levying of a church rate for ecclesiastical purposes only, the rate would not be abolished by the Act of 1868; whereas if the local Act had authorized for equally good consideration the levying of the rate for ecclesiastical and other purposes, the rate would not be enforceable for ecclesiastical purposes. It seems to me that that would be an irrational result as well as not being in accordance with the probable spirit of the legislation having regard to what may be regarded as the good sense and equity of the matter.

In support of Mr. Ryde's contention we were referred to the definition of "church rate" in s. 10 of the Act of 1868. That section defines "church rate" as "any rate for ecclesiastical purposes as hereinbefore defined"; and in the earlier words of the section "ecclesiastical purposes" are defined as meaning "the building, rebuilding, enlargement, and repair of any church or chapel, and any purpose to which by common or ecclesiastical law a church rate is applicable, or any of such purposes." The contention is that that definition must be read into s. 5 where the words "church rates" appear, and therefore s. 5 must be read as dealing with rates which are applicable only to ecclesiastical purposes. I question the correctness of inserting the word "only" into the definition of "church rate," but be that as it may, in my opinion the words "church rates" in s. 5 must be read as referring to the rate described in the private or local Act with which the section is concerned. Therefore I do not feel pressed by the contention that in order to make s. 5 fit in with s. 2 it is necessary to read "church rates" as meaning only those church rates the proceeds of which are applicable to ecclesiastical purposes as defined in the Act. That being so, I must read s. 5 as intended to save a church rate, whether it be a rate levied for other purposes besides ecclesiastical purposes or not, if it is seen that any one of the conditions which are mentioned in the section, and which have been treated by Parliament in the private or local Act as sufficient to justify the provisions of that Act as to the levying of the rate, has been fulfilled. It is sought to bring this rate within s. 5 as being a rate made or levied either "in consideration of the abolition of tithes in any place, or"—and this is another distinct ground of protection—"for good or valuable consideration given." The two learned judges who formed the majority in the Court below say, as I understand their judgments, that, although the consideration on one side appears from the language of s. 14 of the local Act to have been the abolition of tithes and on the other the statutory authorization of a church rate to raise a certain stipend for the rector and certain sums for ecclesiastical purposes, yet the Court is entitled to look further and to say, chiefly, as I understand, on the terms of the preamble, that the only consideration for the abolition of the tithes was the grant of a rate for the purpose of paying the rector's stipend. I cannot agree. It seems to me that it is not right to separate into two parts that which the Act gives as the consideration for the abolition of tithes. The composite rate must be treated as the consideration given for the abolition of tithes, and, as a matter of legal interpretation, it is not right to split up that rate, which was given as an equivalent for the tithes, into two parts, according to the different purposes to which the proceeds of the rate are applicable. If that is the correct view, there is here, in consideration of the abolition of tithes, the enactment by the local Act, 6 Geo. 4, c. clxxvi., of a rate which, for the reasons I have given, is none the less within s. 5 because it may be said to be of a composite character; and the reason that it is not governed by s. 2 is that it has, by reason of a bargain for good consideration, statutory sanction. Such a rate, whether it is composite or not, ought not, in the opinion of the Legislature as expressed in the Act of 1868, to be affected.

With regard to the authorities, none of them are exactly in point, but the one which is nearest to this case is *Reg.* v. *Churchwardens of St. Matthew, Bethnal Green* (1), which went to the House of Lords (2), and in which the point now raised might have been raised. Though that is far from being conclusive, as Mr. Ryde truly says, against the validity of the point, at the same time I cannot help feeling that the language which has been quoted to us from the opinion of Lord Macnaghten in *Fulham Parish* v. *Woolwich Union* (3) is fairly applicable. If it is a good point, it certainly does not appear likely that it would have escaped notice in a case which travelled through so many Courts. No authority, so far as I can see, unless it be certain observations of Field J. in *Watson* v. *Vestry of All Saints, Poplar* (4), gives any colour to the case of the London County Council, and I think that there is a great deal in the reasoning in *Reg.* v. *St. Matthew, Bethnal*

(1) 50 L. T. 65.
(2) 53 L. T. 634.
(3) [1907] A. C. 255, at p. 261.
(4) 46 L. T. 201.

Green (1) which is distinctly against them. In my opinion the appeal should be allowed.

SWINFEN EADY L.J. I am of the same opinion. The first question I have to consider is what is the true construction of the local Act of 1825, and whether, upon its true construction, the church rate in question is brought within s. 5 of the Compulsory Church Rate Abolition Act, 1868. In 1825 it is manifest from the recitals in the Act that there was a proposal, consented to by the patron, the Ordinary, and the rector, which would be beneficial to the inhabitants of the parish, but which could not be carried into effect without statutory authority. It is stated in the case that at that date the rector was entitled to receive, by way of tithe, a sum of 2*s*. 9*d*. in the pound. It was considered to be beneficial to the inhabitants that, instead of the rector being entitled to exact that large and probably growing payment, he should receive a definite sum of 2500*l*. a year. In certain events depending on the price of corn it was to be reducible, and in fact it has been reduced, but for the moment I treat it as being 2500*l*. a year. Thereupon the Act of 1825 was passed, reciting the proposal and the arrangement arrived at, and providing that the churchwardens should for ever thereafter pay or cause to be paid to the rector this sum of 2500*l*. Down to that time there was no liability whatever upon the churchwardens in respect of the rector's stipend. A new obligation was imposed upon them to pay to the rector 2500*l*. a year in lieu of tithes to which he had previously been entitled or might by law have claimed. The statute by s. 7 in terms extinguishes tithes and payments in lieu of tithes as from June 24, 1825. Then comes s. 14. It is impossible to read that section without seeing that it proposes to provide a rate or assessment to be called "the church rate," which shall provide as well for the stipend of the rector as for other purposes which may shortly be described as ecclesiastical. It is easy to understand how beneficial it would be to the inhabitants of the parish that an arrangement should be come to under which a rate, which was to take the place of the growing payments to the rector, should be levied to pay a definite sum to him, and to raise the other sums necessary for ecclesiastical purposes. Then follow certain other provisions in the statute, to which I need not refer, dealing with the incidence, the assessment, the collection and recovery of the statutory church rate. Now the rate which is to be made under this statute is one rate. The churchwardens and inhabitants are not only empowered but are required to make and sign a sufficient assessment to be called "the church rate." There can be no doubt that the power to make and enforce payment of this composite rate, which is called the church rate, was granted in consideration of the extinguishment of the tithe. I think it appears on the face of the statute itself, and I can come to no other conclusion. If that is so, the question then is whether the rate is brought within s. 5 of the Act of 1868. In construing s. 5 regard must be had to the private or local Act in question. Sect. 5 provides that "this Act shall not affect any enactment in any private or local Act of Parliament under the authority of which church rates may be made or levied." In this local Act there is express power to levy a rate which is called "the church rate," and which certainly includes a church rate pure and simple as well as other matters. In my opinion the whole of this composite rate is a "church rate" within the meaning of s. 5 of the Act of 1868.

---

(1) 50 L. T. 65.

As to the authorities, it is said that there is no case in which this point has been raised, although it might have been raised in *Reg.* v. *Churchwardens of St. Matthew, Bethnal Green.* (1) I am not quite sure that that is so, because, as I read that case, the precise point arose as to whether the composite rate was saved by s. 5—not only as to whether part of it was saved, but whether the whole of it was saved by s. 5—that is to say, whether it was excepted by s. 5 from the operation of the Act. That question was raised directly in the Court of Appeal. It may not have been raised directly in the Divisional Court, but it was certainly raised in the Court of Appeal, because in the argument of Mr. Bompas (2) I find this point is taken: "Sect. 5 only applies where by a private or local Act a church rate pure and simple could be made." That is the only point taken before us on behalf of the London

(1) 50 L. T. 65.

(2) 50 L. T. at p. 70.

C. A.
1914

London County Council v. St. Botolph, Bishopsgate, Churchwardens.

County Council. I think that the point was directly raised, and although it is not in terms dealt with in the judgment, still, seeing that it was raised at the Bar, and that the case ultimately went to the House of Lords, and the judgment was affirmed, it cannot be treated as if it was a question that had been overlooked and never raised in the case at all.

I entirely agree with the judgment of Atkin J. in the Court below, and in my opinion this appeal ought to be allowed.

Appeal allowed.

Solicitor for appellants: *E. Tanner.*

Solicitors for respondents: *Clapham, Fraser, Cook & Co.*

W. F. B.

1914
Feb. 10, 11;
March 6.

NEW ZEALAND SHIPPING COMPANY, LIMITED v. DUKE.

[1913 N. 228.]

Insurance (Marine)—Passage Money—Disbursements—Loss—Subsequent Earning of other Passage Money—Salvage.

The plaintiffs, the owners of a ship, effected an insurance by a Lloyd's policy on passage money of a specified amount plus 50 per cent. to Australia and New Zealand "against Passenger Act . . . . to cover any disbursements that may be made by the assured arising from accident or loss on account of passengers for conveyance to intended destination." The ship, after starting on the voyage with a number of emigrant passengers on board who had paid the passage money referred to in the policy, met with an accident, and in consequence the passengers were transferred to other ships, in accordance with the provisions of the Merchant Shipping Act, 1894, in which they were conveyed at the plaintiffs' expense to their destination. The plaintiffs' ship was repaired and subsequently proceeded on the voyage with a fresh lot of passengers on board. The plaintiffs claimed to recover as a loss under the policy the money paid by them for the conveyance of the passengers on the other ships:—

Held, that the policy was an insurance of disbursements which might be made in respect of the passengers whose passage money was referred to in the policy; that the passage money paid by the second lot of passengers could not be treated as salvage; and that the plaintiffs were entitled to recover the sum claimed as a loss under the policy.

Action in the Commercial List tried by Pickford J. without a jury.

The plaintiffs, the owners of the steamship *Westmeath*, claimed a loss under a policy of marine insurance underwritten by the defendant and other underwriters.

The policy was expressed to be "from any ports or places in the United Kingdom to any ports or places in Australia and/or New Zealand upon any kind of goods and merchandise and also upon the body, tackle . . . . of and in the good ship or vessel called the steamship *Westmeath* . . . . for this present voyage. . . . . The said ship, &c., goods and merchandise, &c., for so much as concerns the assured by agreement between the assured and assurer in this policy are and shall be valued at 4758*l.* on passage money plus 50 per cent. (United Kingdom bookings to Australia) so valued, 992*l.* 13*s.* 3*d.* passage money plus 50 per cent. (United Kingdom bookings to New Zealand) so valued—making a total of 5750*l.* 13*s.* 3*d.*—against Passenger Act as per clause attached."

The clause attached was as follows: "Policy for 5750*l.* 13*s.* 3*d.* per steamship *Westmeath*, dated October 25, 1912. This policy to be held to cover any disbursements, &c., that may be made by the assured arising from accident or loss on account of passengers or from any outbreak of sickness among passengers on board or booked to join at intermediate ports whether for maintenance or conveyance to intended destination and for replenishing provisions, &c., lost or destroyed, and whether such disbursements, &c., be compulsory or voluntary, provided same be reasonably incurred. Each underwriter shall be liable for such proportion of disbursements, &c., as his subscription shall bear to the total amount under this policy. Provided always that the underwriter's liability under this policy shall not exceed a total loss in respect of any casualty."

The *Westmeath* started on the voyage from Liverpool in September, 1912, with a number of emigrant passengers on board, but, while still in the Mersey, she dragged her anchors and went ashore and thereby sustained very serious damage. The plaintiffs, as they were bound to do under s. 331 of the Merchant Shipping Act, 1894 (1), maintained the passengers and

---

(1) Merchant Shipping Act, 1894, s. 331: "(1.) When any emigrant ship—

(*a*) has, while in any port of the British Islands, or after the commencement of the subsequently transferred them to other ships, the *Shropshire*, the *Ayrshire*, and the *Nairnshire*, in which they were carried to Australia and New Zealand.

After repairs had been executed to the *Westmeath*, she proceeded in November, 1912, to her original destination carrying other passengers who had been substituted for the original lot. The passage money paid by the latter passengers exceeded that which had been paid by the former.

The plaintiffs claimed in this action as a loss under the policy the various disbursements made by them on account of the passengers after the accident to the *Westmeath*, but the only item which was contested at the trial was the passage money amounting to 3224*l.* 5*s.* 9*d.* paid by the plaintiffs for the carriage of the passengers in the ships to which they were transferred.

The defence to the claim was that the passage money insured had been duly earned without loss, save in respect of disbursements for the maintenance of the passengers; and, alternatively, if there was any loss, the passage money paid to the plaintiffs by the substituted passengers constituted a salvage, and that the underwriters were entitled to receive the benefit thereof in reduction or diminution of the loss.

A further defence was raised based on the fact that the plaintiffs and the owners of the *Ayrshire*, *Shropshire*, and *Nairnshire* were all parties to a pooling agreement under which the earnings of their steamers were pooled, but as this question depended

---

voyage, been wrecked or otherwise rendered unfit to proceed on her intended voyage, and any steerage passengers have been brought back to any port in the British Islands; or

(*b*) has put into any port in the British Islands in a damaged state:

the master, charterer, or owner of that ship shall, within forty-eight hours thereafter, give to the nearest emigration officer a written undertaking to the following effect; (that is to say,)

(i.) If the ship has been wrecked or rendered unfit to proceed on her voyage, that the owner, charterer, or master thereof will embark and convey the steerage passengers in some other eligible ship, to sail within six weeks from the date of the undertaking, to the port for which their passage had been taken; . . . ."

entirely on the terms of the agreement it is unnecessary to refer to it further in this report.

Roche, K.C., and *F. D. Mackinnon*, for the plaintiffs.

M. Hill, K.C., and *R. A. Wright*, for the defendant. The insurance effected by this policy was an insurance of passage money against loss, either through its not being earned on the voyage mentioned in the policy, or through its being expended in disbursements under the Merchant Shipping Act. After the delay caused by the accident the ship proceeded on the voyage and passage money was earned in respect of that voyage. There was therefore no loss of passage money. If it be said that the passage money insured by the policy was not earned, still there was no loss recoverable under the policy, because as against the sums expended by the plaintiffs for the conveyance in other ships of the original lot of passengers in the *Westmeath* there must be brought into account the money received by them from the passengers who actually sailed in the *Westmeath* on the voyage in question. The questions which arise in this case are very similar to those which have arisen with regard to insurances of freight. Where a shipowner has an engaged freight to which a policy of insurance has attached and there is a loss of that freight, he cannot recover that loss under the policy without bringing into account any substituted freight which he has in fact earned: *Everth* v. *Smith* (1); *Barclay* v. *Stirling* (2); *Green* v. *Royal Exchange Assurance Co.* (3); *Scottish Shire Line* v. *London and Provincial Marine and General Insurance Co.* (4)

Roche, K.C., in reply. This is not a case of an insurance of passage money to be earned on a voyage; it is an insurance of the particular passage money specified and valued in the policy plus 50 per cent. "against Passenger Act, as per clause attached." The attached clause shews that the risks insured were disbursements which might have to be made on account of the passengers who had paid that passage money, and the plaintiffs are claiming for disbursements actually made for the conveyance of those passengers in other ships: *Joyce* v. *Kennard* (5); *Gibson*

(1) (1814) 2 M. & S. 278.
(2) (1816) 5 M. & S. 6.
(3) (1815) 6 Taunt. 68.
(4) [1912] 3 K. B. 51.
(5) (1871) L. R. 7 Q. B. 78.

v. *Bradford.* (1) The "adventure" which was the subject-matter of the insurance was not the voyage of the *Westmeath*, but the original passage money, and as soon as it became impossible to carry in the *Westmeath* the passengers who had paid that passage money the "adventure" was at an end. The money which the plaintiffs subsequently received from the second lot of passengers cannot be regarded as salvage, for it had no connection with the original "adventure," which had already terminated. That is the distinguishing feature between this case and the decisions as to insurance of freight. Where freight to be earned on a particular voyage is the subject-matter of the insurance, the voyage is the "adventure," and, if the contemplated freight is lost, any other freight which is earned on that voyage must necessarily be brought into account before a loss can be recovered under the policy.

Cur. adv. vult.

March 6. PICKFORD J. In this case the plaintiffs are suing on a policy of insurance upon a vessel called the *Westmeath* which was carrying emigrants and which was, therefore, subject to the provisions of the Merchant Shipping Act, 1894, with regard to passengers in emigrant ships. The *Westmeath* sailed from Liverpool; while she was in the Mersey, she dragged her anchors and went ashore. She sustained serious injury, and was detained between two and three months whilst the damage was being repaired. The passengers were transferred to other vessels in which they proceeded to their destination. After the repairs to the *Westmeath* had been completed she was in a position to pursue her voyage, and she sailed to the same place as originally intended, carrying other passengers who had been shipped under other contracts in the place of the first lot of passengers. The passage money paid by the passengers actually carried exceeded that paid by the first lot. The question which I have to decide in this action arises with regard to the money paid by the plaintiffs for the carriage of the *Westmeath's* original passengers in the other ships.

It was contended for the defendant that the plaintiffs were not entitled to recover this money as a loss under the policy.

---

(1) (1855) 4 E. & B. 586.

It was said that the policy was an insurance on passage money on a voyage of the *Westmeath*, and that the insurance would cover any passage money received in respect of that voyage; that the voyage on which the *Westmeath* eventually proceeded was the same voyage as that on which she had been engaged at the time she went ashore, and that the passage money insured in respect of that voyage had not been lost, or, if it had been lost, there was salvage in the passage money paid to the plaintiffs by the second lot of passengers. The question is one of general importance and of some difficulty. The money paid by the plaintiffs for the carriage of the first lot of passengers in the other ships was paid under the provisions of s. 331 of the Merchant Shipping Act, 1894, which provides, in substance, that if an emigrant ship has been rendered unfit to proceed on her voyage, the owners are bound to embark and convey the steerage passengers in some other eligible ship to sail within six weeks, and also to maintain the steerage passengers until they proceed on their voyage, in the same manner as if they were at sea. In order to determine the question in this action it is, I think, important to consider exactly what the policy was and what was insured by it. The policy was in the following terms: [The learned judge read the material parts of the policy, and continued:] It is said for the defendant that it was a policy upon passage money upon the specified voyage and that it covered any passage money received on that specified voyage. In my opinion it was not an insurance of passage money in the ordinary sense of the word, although undoubtedly passage money was in one sense the subject-matter of the insurance. The passage money had already been paid and was therefore not at risk. The policy was, in my opinion, a policy to cover a particular risk only, namely, the disbursements which might have to be made in respect of the passengers under the provisions of the Merchant Shipping Act, 1894. It is an insurance against disbursements which might have to be made, not in respect of passage money generally, but in respect of the particular passage money as specified in the policy, namely, "4758*l.* on passage money plus 50 per cent. (United Kingdom bookings to Australia) so valued, 992*l.* 13*s.* 3*d.* on passage money plus 50 per cent. (United Kingdom bookings to New Zealand) so valued." Those were the bookings in respect of the particular passengers who were on board the *Westmeath* when she was damaged. The bookings subsequently obtained were in respect of different passengers and for a different amount from that specified in the policy. I will assume that, if this had been an insurance on freight, the voyage on which the *Westmeath* eventually proceeded would have been the same voyage as that on which she started in the first instance. But that does not appear to me to affect the question, for the view I take of this policy is that it is an insurance of disbursements to be made in respect of those particular passengers whose passage money is expressly referred to in the policy. If that is the true construction of the policy, then the passage money received by the plaintiffs in respect of other passengers subsequently carried under other contracts cannot be regarded as being in substitution for the passage money which had been paid away in disbursements. Nor do I think that the passage money eventually received can be treated as salvage and taken into account on that footing.

[The learned judge then proceeded to deal with the defence based on the pooling agreement, and he came to the conclusion that there was nothing in the terms of that agreement to prevent the plaintiffs from recovering the loss claimed.]

For these reasons I am of opinion that my judgment must be for the plaintiffs.

Judgment for plaintiffs.

Solicitors for plaintiffs: *William A. Crump & Son.*
Solicitors for defendant: *Parker, Garrett & Co.*

F. O. R.

In re PHILLIPS.

1914
March 2.

Bankruptcy—After-acquired Property—Life Policy—Discharge of Bankrupt—Premiums paid by Bankrupt without Knowledge of Trustee—Second Bankruptcy—Death of Assured—Duty of Trustee.

A bankrupt the year before his discharge became operative effected a policy on his own life at an annual premium, and kept the policy on foot for six years when he became bankrupt a second time and shortly afterwards died. The policy was disclosed in the second bankruptcy and the trustee in that bankruptcy received the policy moneys, which admittedly belonged to the trustee in the first bankruptcy, who did not know of the existence of the policy:—

Held, that the trustee in the first bankruptcy as an officer of the Court was under no obligation—legal, equitable, or moral—to allow out of the policy moneys to the trustee in the second bankruptcy the amount of the premiums the debtor had paid.

In re Tyler [1907] 1 K. B. 865 distinguished.

Tapster v. *Ward* (1909) 101 L. T. 503 followed.

THIS was an application for directions as to the application of certain policy moneys in these circumstances.

In 1900 the debtor was adjudged bankrupt in the county court of Cornwall holden at Truro, and the official receiver at Truro was the trustee in the bankruptcy. The debtor's unsecured liabilities exceeded 1600*l.*, and his assets realized 35*l.*, and no dividend was paid. On August 28, 1906, he applied for his discharge at the Truro County Court, and an order was made suspending his discharge for two years.

On October 8, 1913, a receiving order was made against the debtor in the London Bankruptcy Court. Adjudication followed on October 11, and the official receiver in London was the trustee in the London bankruptcy. On October 27 the debtor was killed in a motor car accident.

Among the assets disclosed by the debtor in his second bankruptcy was a policy of assurance on his own life for 1000*l.* in the Atlas Insurance Company at the annual premium of 26*l.* 10*s.*, which he effected in November, 1907, i.e., during the two years' suspension in his first bankruptcy. The policy was held by his bankers to secure an overdraft, and was on foot at the time of his death. The trustee in the first bankruptcy was not aware of the existence of the policy. The official receiver in London claimed from the Atlas Company the moneys due in respect of the policy, and received the sum of 672*l.* 18*s.* 4*d.*, being the sum assured less 327*l.* 1*s.* 8*d.* the amount due to the bankers. The policy admittedly belonged to the official receiver at Truro as the trustee in the first bankruptcy, and the question arose whether the official receiver in London was entitled to deduct and retain out of the 672*l.* 18*s.* 4*d.* the six annual premiums the debtor had paid to keep up the policy. Both trustees being officers of the Court were desirous of doing what was right, and accordingly the official receiver in London applied to the Court for directions as above stated.

E. W. Hansell, for the official receiver in London. The facts of this case are not quite the same as in any reported case. It is a question between two classes of creditors, and it is submitted that the premiums paid by the debtor ought to be allowed to the trustee in the second bankruptcy out of the policy moneys. At the time the policy was taken out and for some years afterwards it was of no value although it belonged to the trustee in the first bankruptcy. The bankrupt was under a statutory duty to disclose the policy to the trustee and to give him the opportunity to pay the premiums to keep it alive. The premiums have in fact been paid by the bankrupt out of property to which the creditors in the second bankruptcy would have been entitled. It is not suggested that the trustee in the second bankruptcy has any lien on the policy for the premiums that have been paid, but it is submitted that the principle of *In re Tyler* (1) and *Ex parte James* (2) applies, and that the trustee in the first bankruptcy, as an officer of the Court, must do what is just and right and what a high-minded man would do. It is true that the decision in *In re Tyler* (1) as explained in *In re Hall* (3) proceeded on the fact that the trustee stood by and allowed the premiums to be paid, but the principle of *Ex parte James* (2) was approved. *Tapster* v. *Ward* (4) was an entirely different case to this. It was a contest between the trustee and the legal

(1) [1907] 1 K. B. 865.

(2) (1874) L. R. 9 Ch. 609.

(3) [1907] 1 K. B. 875.

(4) 101 L. T. 25, 503.

personal representative of the bankrupt, and it was held that the legal personal representative had no rights as against the creditors. Here the question is between two bodies of creditors, and it would not be right to allow the trustee in the first bankruptcy to take the policy moneys without repaying the premiums which have created that asset.

P. Francke, for the trustee in the first bankruptcy. The doctrine of salvage does not apply to the voluntary payment of premiums to keep on foot a policy: *In re Leslie* (1); *Falcké* v. *Scottish Imperial Insurance Co.* (2)

[He was stopped.]

Horridge J. The debtor in this case became bankrupt in the county court of Truro in 1900. On August 28, 1906, an order was made granting his discharge, but suspending it for two years. On November 29, 1907, the bankrupt took out a policy for 1000*l.* on his own life at an annual premium of 26*l.* 10*s.* He therefore effected the policy at a time when he had not got his discharge, and the policy belonged to the official receiver as trustee in his bankruptcy in the Truro County Court. He paid out of his own moneys one premium of 26*l.* 10*s.* before he obtained his discharge, and after he obtained his discharge he paid premiums amounting to 132*l.* 10*s.* On October 8, 1913, a receiving order was made against him in the London Bankruptcy Court, and on October 11, 1913, he was adjudicated bankrupt. On October 27, 1913, he was killed in a motor car accident, and the policy moneys, subject to the charges upon them, became payable and the official receiver in the London Bankruptcy Court received 672*l.* 18*s.* 4*d.* He does not dispute his liability to hand over that amount to the official receiver of the Truro County Court except to the extent of 159*l.* which represents the amount of the premiums paid by the bankrupt since he obtained the order of discharge subject to suspension.

The question therefore which I have to decide is whether or not the official receiver in London is entitled to retain in his own hands a sum corresponding with the moneys paid by the bankrupt for premiums. I do not think that there is any legal or equitable right in the official receiver under the London bankruptcy to retain those moneys in any way out of the funds received from the policy. The two cases of *In re Leslie* (1) and *Falcké* v. *Scottish Imperial Assurance Co.* (2) establish this. In the subsequent case of *Tapster* v. *Ward* (3), where the facts were very similar to those in this case, the Master of the Rolls in the course of his judgment says—referring to the legal personal representative of the debtor—"He admits that neither at law nor in equity has he any lien on the policy moneys for the premiums which have been paid." The question, however, remains whether or not the official receiver of the Truro district, to whom these policy moneys belong, ought as a matter of doing what is right to allow to the estate of which the official receiver in London is the trustee the amount of the premiums. In this case there is no ground for saying that the official receiver of the Truro district in any way stood by, or even knew of the policy which had been effected by the bankrupt. I think the judgment in the case of *In re Tyler* (4), with the light thrown upon it by the judgment of Farwell L.J. in *In re Hall* (5), must now be taken to have been based on the knowledge of the trustee in bankruptcy of the existence of the policy and the necessity for payment of premiums, and the fact that the wife was in that case paying them, and is not an authority for saying that, where the bankrupt without the knowledge of the official receiver has kept up a policy which belongs to the official receiver as trustee, the official receiver cannot intervene without paying the premiums. It seems to me that the case of *Tapster* v. *Ward* (3) is a direct authority in this case. The only difference is that in that case the policy was effected and only one premium was paid before the bankruptcy, whereas in this case the policy was effected and a premium was paid during the first bankruptcy. There is also in this case the additional fact that the rights of the bankrupt had become vested in the official receiver in the London district as representing the creditors under the second bankruptcy. Now ought those two differences to lead me to any different conclusion

---

(1) (1883) 23 Ch. D. 552.

(2) (1886) 34 Ch. D. 234.

(1) 23 Ch. D. 552.
(2) 34 Ch. D. 234.
(3) 101 L. T. 503.
(4) [1907] 1 K. B. 865.
(5) [1907] 1 K. B. 875.

to what was arrived at in *Tapster's Case*? (1) I cannot see why they should. To deal with the first one, although the policy in *Tapster's Case* (1) was entered into before the bankruptcy and no intimation of it was given to the official receiver, yet in this case the policy was entered into whilst the bankruptcy was pending and no intimation given of it to the official receiver. Ought the fact that there was perhaps a greater duty to disclose the policy in the one case than in the other to make any difference? I cannot see that it should as regards vesting the property in the official receiver. Then does the fact that a second bankruptcy has occurred make any difference? I do not see how it can. The trustee or the official receiver in the second bankruptcy only takes the right which the bankrupt himself would have had, and *Tapster's Case* (1) decides that the official receiver in the Truro district would have been under no obligation (and when I use the word "obligation" I mean the moral and high standard obligation and not a legal obligation) to allow the trustee in the second bankruptcy anything in respect of the premiums. I do not think the fact that the debtor subsequently became bankrupt again makes any difference in regard to the official receiver of Truro. In my opinion the London official receiver ought to hand over the moneys received by him, and the costs of all parties to these proceedings will come out of the fund.

Solicitors: *Tarry, Sherlock & King; Sydney James.*

---

(1) 101 L. T. 503.

H. L. F.

1914

Feb. 2, 9, 10;
March 2.

In re DAVID AND ADLARD.
Ex parte WHINNEY.

Bankruptcy—Insolvent Traders—Transfer of Business to Private Company—Shares and Debentures—Bona fides—Approval of Majority of Creditors—Defeating or delaying Creditors—Fraudulent Conveyance—Act of Bankruptcy—(1571) 13 *Eliz. c.* 5—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*b*).

Two debtors trading in partnership, whose liabilities amounted to 20,000*l.* and who were unable to meet their engagements as they fell due, assigned their business as a going concern with the approval of the majority of their creditors to a private company for 5000*l.* in fully paid up shares and 20,000*l.* in debentures. By the articles of association of the company the two debtors were made permanent directors of the company at fixed salaries and did not vacate office if they became bankrupt. The debentures were a floating charge in common form for five years, but became immediately enforceable if the usual events happened. The majority of the creditors accepted debentures as security for their debts. Within three months the debtors became bankrupt, and the trustee in bankruptcy claimed that the assignment to the company was void as against him under the statute 13 Eliz. c. 5, and also as an act of bankruptcy under sub-s. 1 (*b*) of s. 4 of the Bankruptcy Act, 1883:—

Held, that the assignment was not void under the statute of Elizabeth, for it was made in good faith and for valuable consideration and was not in fact fraudulent or entered into with a fraudulent intent.

But *held*, that the assignment was an act of bankruptcy because it naturally tended to defeat and delay any creditors who wished to enforce their ordinary rights against the debtors' estate.

In re Harris (1906) 14 Man. 127 discussed.

THIS was an application to test the validity of the transfer of the debtors' business to a private company under the following circumstances.

The following statement of facts is taken substantially from the judgment:—

The bankrupts Arthur Charles David and George Charles Johnson up to the time of the formation of the limited company hereinafter mentioned traded as the firm of Roberts, Adlard & Co. That firm were indebted to Lord Penrhyn on two bills of exchange, one for 600*l.* and the other for 524*l.* 3*s.* 4*d.*, which both fell due on April 3, 1913. About the time when the bills became due Lord Penrhyn employed the firm of Messrs. Whinney, Smith & Whinney to investigate the affairs of the firm of Roberts, Adlard & Co. During the course of such investigation a statement of affairs was prepared by Messrs. Whinney, Smith & Whinney shewing a paper surplus of assets over liabilities of 7000*l.* odd. It was suggested on behalf of Lord Penrhyn to the bankrupts' firm that they should give debentures to him, but this they refused to do. Subsequently fresh negotiations were commenced which ultimately got into the hands of the respective solicitors, but nothing came of such negotiations. On July 21, 1913, Messrs. Edwards, Heron & Co. on behalf of the bankrupts wrote to Messrs. Whinney, Smith & Whinney suggesting the formation of a company and the issue of debentures to creditors, but on July 22, 1913, Messrs. Whinney, Smith & Whinney replied that it was then too late to consider the question of a company. On July 24, 1913, Lord Penrhyn issued a writ against the bankrupts, who by a letter dated July 26 through Messrs. Saffery, Sons & Skinner, accountants, gave notice of a meeting of those creditors who were principally interested in the affairs of the firm for Thursday, July 31, at 12 o'clock. A statement was produced at that meeting which had been prepared by Messrs. Saffery, Sons & Skinner which also shewed a surplus of assets over liabilities of 7000*l.* odd. The principal items in that statement on the assets side were book debts and stock, and those assets were proved by subsequent realization to have been approximately correctly set out in that statement. A scheme was proposed at that meeting for carrying on the business by turning it into a private limited liability company and by the issue by such company of 5 per cent. debentures to creditors of over 50*l.* The two partners were to be the sole directors, and there was to be an advisory committee, three in number, representing the debenture-holders and who were to have power to investigate affairs and at any time to call a meeting of the debenture-holders, who were to have power to stop the business if they were not satisfied. An adjournment was moved on behalf of Lord Penrhyn and was carried. The adjourned meeting was held on August 7, and at that meeting, out of creditors representing 13,858*l.*, creditors representing 8900*l.* were in favour of the scheme, and creditors representing 4958*l.*

were adverse to it. On August 9 on the instructions of the bankrupts a private company was registered under the name of Roberts, Adlard & Company, Limited, and on August 11 an agreement of sale of the whole of their business assets was entered into between the bankrupts' firm and the new company. The instructions both for the memorandum and the articles of association for the new company, and also for the agreement of sale, were given by the bankrupts. The consideration for the sale was to be the sum of 25,000*l.* to be paid and satisfied as to 20,000*l.* by the issue of 1950 debentures of 10*l.* each and 100 debentures of 5*l.* each, and as to 5000*l.* by the allotment to the bankrupts or their nominees of 5000 shares of 1*l.* each. By article 28 of the articles of association the bankrupts were made permanent directors of the company, and each of them was to be entitled to hold office so long as he should live unless he became disqualified in pursuance of article 33 by becoming of unsound mind, being convicted, ceasing to hold his share qualification, being absent for a period of six calendar months, or giving the directors one calendar month's notice. It was provided by article 1 that clause 77 of Table A should not apply, and therefore they were not to vacate their office of directors on becoming bankrupt. By article 31 the remuneration of Mr. David was fixed at 600*l.* per annum and that of Mr. Johnson at 300*l.* per annum. Subsequently to the formation of the company debentures representing 20,000*l.* were issued, and of these 20,000*l.* debentures, debentures representing 13,225*l.* were either issued directly to creditors as security, transferred to creditors as security or handed to creditors as security, and the balance of 6775*l.* was placed in the hands of a Mr. Stirling as an informal trustee for the purpose of handing debentures to creditors. The 5000 1*l.* shares were issued to the bankrupts, who shortly afterwards sold a number of them at the price of 1*s.* each.

On October 21, 1913, a receiving order was made against the debtors on a bankruptcy petition presented against them by Lord Penrhyn based on the judgment he had obtained against them on his writ in the King's Bench Division, and adjudication followed. Mr. Whinney, the trustee in bankruptcy, desired to test the validity of the transfer of the debtor's business to the company, but the majority of the committee of inspection and of the creditors were opposed to this course. Subsequently Lord Penrhyn, on giving security, obtained leave to use the name of the trustee for that purpose. The notice of motion asked for a declaration that the assignment of August 11, 1913, was fraudulent and void, as against the trustee, (1.) under the statute 13 Eliz. c. 5, and (2.) as an act of bankruptcy under sub-s. 1 (*b*) of s. 4 of the Bankruptcy Act, 1883.

Clayton, K.C., and *E. W. Hansell*, for the motion. The bona fides of the transaction is not disputed, and it may be that the assignment is not fraudulent and void within the statute of Elizabeth. But if not fraudulent in fact, it is fraudulent in law and an act of bankruptcy, for, whatever the motives may have been, it necessarily tends to defeat and delay creditors: *Smith* v. *Cannan* (1); *In re Wood* (2); *Ex parte Chaplin* (3); *In re Carey* (4); *In re Hirth* (5); *In re Slobodinsky* (6); *In re Sharp* (7); *Gonville's Trustee* v. *Patent Caramel Co.* (8); *In re Goldburg.* (9) The effect of this assignment, if valid, is that the debtors against the will of some of their creditors have it within their own power to withdraw all their property from the execution of their creditors and from administration in bankruptcy and to place it in their own power in the name and under the guise of the company, and continued trading may cause the assets to disappear before the debentures become payable. *In re Harris* (10) will be cited by the respondents, but it is contrary to the whole current of authority and is in direct conflict with *In re Sharp.* (7) It may be distinguishable, however, on the ground that there the company agreed to pay the debts of the business—which is not the case here—and the trustee could have enforced that indemnity if the debts were not paid, and on obtaining judgment the debentures would have been payable immediately.

Duke, K.C., and *F. Mellor*, for the company. The suggestion of a company originated with Lord Penrhyn, and the transaction was entered into in good faith and for value with the approval of the majority of the creditors. There was no fraud in point of fact, and the assignment is not void under the statute of Elizabeth. Then can the Court without fraud in fact set aside the assignment as an act of bankruptcy? In other words, in bankruptcy is actual fraud necessary, or is it sufficient to say that the effect of the transaction is to defeat and delay creditors? It is submitted that, where there is no fraud in fact, an assignment of assets does not of necessity defeat or delay creditors. The intent to defeat and delay must be found as a fact: *Alton* v. *Harrison* (1); *Spencer* v. *Slater* (2); *Boldero* v. *London and Westminster Loan and Discount Co.* (3); *Maskelyne and Cooke* v. *Smith* (4); *Smith* v. *Cannan* (5); *In re Spackman.* (6) In most of the cases cited against the assignment fraud was found as a fact. Further, the cases shew that where a trader in disposing of his assets gets something which to him and his creditors is an equivalent it is not an act of bankruptcy: *Woodhouse* v. *Murray* (7); *Morris* v. *Morris* (8); *In re Harris.* (9) Admitting that *In re Sharp* (10) is not consistent with *In re Harris* (9), the present case is indistinguishable from *In re Harris* (9), which was a decision in fact that what was done did not tend to defeat or delay creditors. Here the debtors obtained an equivalent for themselves and their creditors in shares and debentures which were valuable, and the goodwill of the business was preserved. A large group of the creditors took debentures, and the remaining debentures were in specie and could be dealt with and sold as goods and chattels if execution were levied, and an execution creditor could have got immediate payment. Therefore the transaction did not tend to defeat or delay creditors.

---

(1) (1853) 2 E. & B. 35, 39.
(2) (1872) L. R. 7 Ch. 302, 308.
(3) (1884) 26 Ch. D. 319, 331.
(4) [1895] 2 Q. B. 624.
(5) [1899] 1 Q. B. 612, 620.
(6) [1903] 2 K. B. 517, 524, 530, 531.
(7) (1900) 83 L. T. 416.
(8) [1912] 1 K. B. 599.
(9) [1912] 1 K. B. 384.
(10) 14 Man. 127.

Clayton, K.C., in reply, referred to *Ex parte Villars* (11) and *Wheatley's Trustee* v. *H. Wheatley, Ld.* (12)

Cur. adv. vult.

---

(1) (1869) L. R. 4 Ch. 622.
(2) (1878) 4 Q. B. D. 13.
(3) (1879) L. R. 5 Ex. 47, 51.
(4) [1902] 2 K. B. 158.
(5) 2 E. & B. 35.
(6) (1890) 24 Q. B. D. 728, 740.
(7) (1867) L. R. 2 Q. B. 634, 638.
(8) [1895] A. C. 625, 629.
(9) 14 Man. 127.
(10) 83 L. T. 416.
(11) (1874) L. R. 9 Ch. 432, 434, 442, 443.
(12) (1901) 85 L. T. 491.

March 2. HORRIDGE J. stated the facts, and continued: It was contended before me that the assignment of August 11, 1913, was void (1.) under the statute 13 Eliz. c. 5, and (2.) as an act of bankruptcy under s. 4, sub-s. 1 (*b*), of the Bankruptcy Act, 1883. The motion was opposed before me by creditors representing 9022*l.* and supported by creditors representing 4200*l.* As regards the question under the statute of Elizabeth it was admitted that if I held that the assignment was for good consideration it was necessary for the applicant to establish that the assignment was in fact fraudulent. I think the assignment was clearly one made for good, that is valuable, consideration, and I have come to the conclusion that it was entered into perfectly bona fide with the approval of a majority of the creditors, and was not in fact fraudulent or entered into with a fraudulent intent.

It was, however, contended before me that it must be held to be an act of bankruptcy and to be fraudulent because it tended to defeat and delay creditors. I think the question which I have to consider is the one stated at p. 130 of the report of *In re Harris* (1) in the judgment of Bigham J. if one reads, instead of "defeat and delay," "defeat or delay" as the learned judge himself alters the expression later on in the judgment. I have therefore to decide whether this transaction naturally tends to defeat or delay creditors. I think the question stated in this form is in accordance with the cases of *Smith* v. *Cannan* (2), *In re Wood* (3), and *In re Spackman.* (4) If this question is answered in the affirmative the assignment would be fraudulent within s. 4, sub-s. 1 (*b*), of the Bankruptcy Act, 1883. The case which gives me the greatest difficulty is *In re Harris* (5), but I think when carefully examined it appears that the learned judge in that case came to the conclusion that, inasmuch as the transaction was a perfectly honest transaction and the debentures were handed to the debtors and could have been taken under an execution against them, the assignment merely amounted to a change in the form of assets and that the debentures would

(1) 14 Man. 127, 130.

(2) 2 E. & B. 35.

(3) L. R. 7 Ch. 302.

(4) 24 Q. B. D. 728.

(5) 14 Man. 127.

be equally available for the purpose of seizure and sale as the assets themselves would have been.

I think in this case I must look at the transaction as a whole, and I think the object and effect of it was to enable the bankrupts, who in fact were the company, to carry on their business without interruption by creditors, and that the debentures received on account of the purchase price should not be assets for creditors generally, but should be accepted by individual creditors. When those debentures had, as was the case here, been handed to the extent of 13,225*l.* to specific creditors, the only debentures available to be seized were those representing 6775*l.* The debentures themselves could not be enforced, except in case of default, for a period of five years. Looking at the scheme as a whole, I think the assignment was one which did tend to defeat and delay any creditors who wished to enforce their ordinary rights as against the bankrupts' estate. I have not dealt at length with the cases of *In re Sharp* (1) and *Wheatley's Trustee* v. *H. Wheatley, Ld.* (2), as they seem to me to be only instances in which Wright J. answered the question, which I have stated, upon different facts to those in this case in the same way in which I have answered it. I think the language of Cockburn C.J. in *Woodhouse* v. *Murray* (3), to which Mr. Duke referred me, merely shews that, if in this case I had thought there was an actual equivalent received by the bankrupts for the assignment, and that whatever constituted that equivalent was equally available for satisfying the creditors of the debtors, the assignment would not then be one which tended to defeat or delay creditors. For the reasons above stated, I am of opinion that on the facts of this case the assignment was one which tended to defeat and delay the creditors of the bankrupts, and is therefore an act of bankruptcy and void as against the trustee in bankruptcy.

Solicitors: *Hores, Pattisson & Bathurst*; *Edwards, Heron & Co.*

(1) 83 L. T. 416. (2) 85 L. T. 491.
(3) L. R. 2 Q. B. 638.

H. L. F.

In re BRANSON.
Ex parte THE TRUSTEE.

1914
March 9.

Bankruptcy—Practice—Application by Trustee against Third Party—No Committee of Inspection—No Sanction by Board of Trade—Objection to Procedure—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 22, *sub-s.* 9; *s.* 57, *sub-s.* 3; *s.* 73, *sub-s.* 3; *ss.* 89, 90—*Bankruptcy Act,* 1890 (53 *&* 54 *Vict. c.* 71), *s.* 15, *sub-s.* 3—*Bankruptcy Rules,* 1886 *and* 1890, *r.* 117.

Sect. 22, sub-s. 9, and s. 57 of the Bankruptcy Act, 1883, and s. 15 of the Bankruptcy Act, 1890, which require a trustee in bankruptcy, before taking any proceedings or employing a solicitor, to obtain the sanction of the committee of inspection or of the Board of Trade, are provisions for the protection of the estate, as between the trustee and the estate, on matters relating to his costs, charges, and expenses, and afford no defence to any proceeding which the trustee, without such sanction, may institute against other parties.

This was an application by the trustee for an order that the debtor's solicitors should deliver up to him all books, papers, and documents in their possession belonging to the bankrupt together with a full cash account shewing dealings by them for and on behalf of the bankrupt, and delivery of all bills of costs in respect of all matters transacted on behalf of the bankrupt.

On December 9, 1913, a receiving order was made against the bankrupt. Adjudication followed, and a trustee was appointed.

On February 4, 1914, the trustee launched a motion against Messrs. Batchelor & Cousins for an order as above stated. The return day of this motion was February 16; but on February 10 the bankrupt, as a party aggrieved, applied to the Court for an injunction to restrain the trustee and his solicitors from proceeding with their motion of February 4 on the ground that no committee of inspection had been appointed pursuant to s. 57 of the Bankruptcy Act, 1883, and that the necessary sanction of the Board of Trade had not been obtained pursuant to sub-s. 9 of s. 22 of that Act, but the Court, on counsel for the trustee undertaking to get the sanction of the Board of Trade or of the committee of inspection if appointed, made no order on the application except that there should be liberty to apply.

On February 16 a meeting of creditors was held and a committee of inspection was appointed who subsequently passed a resolution sanctioning the proceedings the trustee had taken against Messrs. Batchelor & Cousins and authorizing him to employ Messrs. Osborn & Osborn to continue the same.

March 9. The trustee's motion now came on again.

Messrs. Batchelor & Cousins claimed no lien for costs on the documents and papers in their possession, and were ready and willing to hand them over to the trustee and to deliver a cash account, and the matter resolved itself mainly into a question of costs. No notice to annul the adjudication had been given.

E. W. Hansell, for the motion.

F. Barrington-Ward, for the respondents. There is a preliminary objection which goes to costs. The motion was premature. In *Lee* v. *Sangster* (1) an action was brought in the Queen's Bench by the assignee in bankruptcy without first obtaining the leave of the Court of Bankruptcy, and it was held that the absence of such leave afforded no defence to the action. But this is an application in bankruptcy, and by s. 90 of the Bankruptcy Act, 1883, the bankrupt or any other person aggrieved by any act of the trustee can apply to the Court for relief; then under s. 89, s. 57, sub-s. 3, and s. 22, sub-s. 9, of the Act the trustee must act under the direction of the committee of inspection, and cannot institute any proceedings or employ a solicitor without the sanction of the committee or, if there is no committee, of the Board of Trade. Further, by s. 15, sub-s. 3, of the Bankruptcy Act, 1890, the sanction must be obtained before the employment of the solicitor, so that the sanction of the committee or of the Board of Trade is a condition precedent to the trustee instituting any proceedings. Here there was no committee and the leave of the Board of Trade was not obtained. Therefore the motion was launched without any authority and was wholly irregular and premature, and cannot be ratified by any subsequent resolution of the committee.

---

(1) (1857) 2 C. B. (N.S.) 1.

E. W. Hansell, for the trustee. A bankrupt has no right to interfere in the administration of the estate—*In re Austin* (1)—and his solicitors who have no lien are in no better position. Sub-s. 3 of s. 73 of the Bankruptcy Act, 1883, and r. 117 of the Bankruptcy Rules, 1886 and 1890, shew that the object of the procedure under ss. 22 and 57 of that Act and s. 15, sub-s. 3, of the Bankruptcy Act, 1890, is to protect the estate, as between the trustee and the estate, on taxation of his costs, charges, and expenses. Those provisions do not apply to this motion, which is an application in substitution for an action at law: *In re Angerstein.* (2) The principle of *Lee* v. *Sangster* (3) applies. Whether the trustee will hereafter be allowed his costs of these proceedings on taxation in the bankruptcy is beside the precise point now before the Court, on which there is no direct authority.

F. Barrington-Ward in reply.

Horridge J. This is a motion by the trustee of the estate of G. F. Branson against Messrs. Batchelor & Cousins asking for delivery to the trustee of all books, papers and documents in their possession, and for a cash account shewing their dealings for and on behalf of the bankrupt, and for delivery of all their bills of costs. The first objection taken to the motion is that at the time it was launched there had been no consent obtained from the committee of inspection. The section which deals with that is s. 57. It says "The trustee may, with the permission of the committee of inspection, ... bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt." It is quite clear that no such consent had been obtained in this case. Mr. Ward further relied upon s. 15, sub-s. 3, of the Bankruptcy Act of 1890, which provides that the sanction required under s. 73 of the Bankruptcy Act, 1883, for the employment of a solicitor "must be a sanction obtained before the employment, except in cases of urgency, and in such cases it must be shown that no undue delay took place in obtaining the sanction." The question is whether the obtaining of that sanction is a matter for the protection of the estate so

---

(1) (1879) 10 Ch. D. 434.

(2) (1874) L. R. 9 Ch. 479.

(3) 2 C. B. (N.S.) 1.

1914

BRANSON, *In re.* THE TRUSTEE, *Ex parte.*

Horridge J.

that the trustee may not incur solicitors' costs without getting the sanction of the committee, or whether the section creates a condition precedent to the right of the trustee to take proceedings against any third parties. The case of *Lee* v. *Sangster* (1) says that the absence of such sanction could not be pleaded as a defence to an action in the High Court. The case of *In re Angerstein* (2) shews that an application by motion in the Court of Bankruptcy is in substitution for an action at law. I think, therefore, on the authority of those two cases that the preliminary objection cannot be sustained. In addition to those cases, s. 73 of the Bankruptcy Act, 1883, and r. 117 of the Bankruptcy Rules tend to shew that the provision is one for the protection of the estate, because they both provide for the production of the necessary evidence before the taxing Master of the sanction having been obtained. The point may occur again, and therefore I think it as well to give a distinct ruling upon it. My ruling is that the obtaining of the consent of the committee of inspection to the taking of proceedings is merely a provision for the protection of the estate and is not one which the respondent or the defendant in any proceedings by the trustee is entitled to avail himself of in answer to those proceedings.

Solicitors: *Osborn & Osborn ; Batchelor & Cousins.*

(1) 2 C. B. (N.S.) 1.

(2) L. R. 9 Ch. 479.

H. L. F.

NICHOLAS *v.* DAVIES.

1914 *March* 6.

Licensing Acts — Closing Hours — Populous Place — Cancellation of Order declaring Place to be—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 & 1 *Geo.* 5, *c.* 24), *Sixth Schedule, Special Provision* 2.

The Sixth Schedule of the Licensing (Consolidation) Act, 1910, which deals (inter alia) with the determination of what areas are populous places for the purpose of the hour of closing licensed houses in such areas, enacts by Special Provision 2 that "Any order of the confirming authority of the county for the purposes of this schedule may be made from time to time at a meeting specially convened for the purpose . . . . Provided that an order restrictive of a previous order shall not be made except on a revision after the publication of a census."

A certain area had been duly declared to be a populous place. Subsequently a new census of the population was taken which shewed that the population of that area had increased, but that that of the adjoining districts had increased in a higher proportion:—

Held, that the confirming authority had jurisdiction to declare the area in question to be no longer a populous place; that the abovementioned proviso did not mean that the confirming authority could only make a restrictive order if the census shewed that the population had declined, but merely that they must take the population as shewn at the new census as one of the elements for consideration, it being open to them to hold, in view of the greater increase of population in the adjoining districts, that the standard of density in the neighbourhood had risen.

CASE stated by the committee of the Glamorganshire Quarter Sessions appointed under s. 6 of the Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), to exercise the powers of the quarter sessions as the confirming authority.

At a special meeting of the said confirming authority at Cardiff on June 23, 1913, held pursuant to Sched. VI. (1) of the

---

(1) By the Sixth Schedule of the Licensing (Consolidation) Act, 1910, it is provided that the general closing hours in Wales for premises in a town or populous place shall be "on the nights of all days in the week except Saturday and Sunday from eleven o'clock until six o'clock on the following morning" and in other places "from ten o'clock until six o'clock on the following morning." And by Special Provision 2 of that schedule "'Populous place' means any area with a population of not less than one thousand, which by reason of the density of its population the confirming authority of the county by order determine to be a populous place.

"Any order of the confirming

Act for the purpose among other things of revising the orders in force declaring places to be towns or parts of towns or populous places, and the altering and cancelling of any such orders, or the making of further orders, and to consider a communication from the justices of the Pontardawe petty sessional division asking that the order determining Ystalyfera to be a populous place be altered or cancelled, the appellant appeared in support of the existing order declaring Ystalyfera to be a populous place, and the respondent appeared to support the cancelling or alteration of the said order, and upon hearing evidence on oath and counsel on behalf of the appellant and the respondent the confirming authority made an order whereby the order in existence declaring Ystalyfera to be a populous place was cancelled, subject to the opinion of the King's Bench Division upon the following case:—

The appellant is the licensee of the Wern Fawr Inn at Ystalyfera in the county of Glamorgan. The respondent is a colliery proprietor residing at Ystalyfera.

All licensed premises at Ystalyfera which are upon the main road from Pontardawe to Ystradgynlais, being fifteen in number and extending over a length of road of 2407 yards, have remained open for the sale of intoxicating liquors until 11 P.M. for at least the last twenty-five years, but no order of the licensing authority for the county of Glamorgan pursuant to s. 32 of the Licensing Act, 1874, declaring the part of the parish of Llangiwg comprising the above area to be a populous place, or defining the boundaries of any populous place in this district, was proved. The case, however, was argued and the decision of the Court is sought to be obtained on the presumption that the practice of keeping open the above houses until 11 o'clock was the result of an order having been made declaring Ystalyfera to be a populous place.

According to the census returns for 1881, 1891, 1901, and 1911 the population of the parish of Llangiwg was 9109, 9707, 12,375, and 19,344 for the respective years. No evidence was available

---

authority of the county for the purposes of this schedule may be made from time to time at a meeting specially convened for the purpose . . . .

"Provided that an order restrictive of a previous order shall not be made except on a revision after the publication of a census."

as to the exact proportion of population that occupied Ystalyfera as distinguished from the rest of the parish of Llangiwg, but the population of Ystalyfera has increased, and in the other parts of the parish of Llangiwg which were not affected by any such order the proportionate increase of population had been greater.

Ystalyfera is situated within the Pontardawe rural district. No parish, ward, or place within that district except Ystalyfera has been determined to be a populous place within the meaning of Sched. VI. of the Act of 1910, and all the licensed houses within that district (except as aforesaid) are closed at 10 P.M.

It was contended on behalf of the appellant that, as Ystalyfera had a population of not less than 1000 as required by Sched. VI., Special Provision 2, of the Licensing (Consolidation) Act, 1910, and as such place had been determined to be a populous place no order restrictive of or cancelling a previous order could be made except upon proof of a reduction of population as shewn by the last taken census. It was further contended that, as the population of Ystalyfera had increased, no order to the contrary could be made.

It was contended on behalf of the respondent that, as the districts surrounding and adjacent to Ystalyfera in the Pontardawe rural district were now more populous than Ystalyfera (as is the fact), whereas at the time of the making of such order Ystalyfera was relatively to the other districts more populous, the confirming authority could cancel the said order even if the population of Ystalyfera had increased.

The confirming authority held that the district of Ystalyfera was no longer a populous place within the meaning of Sched. VI., and the existing order declaring the said district to be a populous place was ordered to be cancelled.

The question for the opinion of the Court is whether the confirming authority had jurisdiction to do so.

Clavell Salter, K.C., and *H. G. Farrant,* for the appellant.

[SCRUTTON J. What jurisdiction had the confirming authority in this case to state a special case?]

The quarter sessions' power of stating a case is not, like that of justices in petty sessions, derived from statute, but is an

1914

NICHOLAS
v.
DAVIES.

inherent power arising from the fact that they are a Court: *Rex* v. *Southampton Licensing Justices.*(1) As the census shewed that the population of Ystalyfera had increased since the order declaring it to be a populous place was made, the confirming authority had no jurisdiction to cancel that order. It is difficult to see what meaning can be attached to the requirement that such an order shall only be made on a revision after the publication of a census, if it does not prohibit the making of such an order except where the census shews that the place has in fact become less populous. When once the licensing authority have declared that the needs of the district entitle it to the status of a populous place with the privilege of having its licensed houses remain open to a later hour than the ordinary, that status is not to be taken away unless the census shews that those needs have ceased; and the needs of the district do not become less merely because the needs of other districts have increased.

Meager, for the respondent, was not called upon.

CHANNELL J. In this case a preliminary question was raised as to whether the quarter sessions had any power to state a case. In my opinion the quarter sessions, when determining whether this district was a populous place or not, were acting in an administrative and not in a judicial capacity. But notwithstanding that fact I think the case of *Rex* v. *Southampton Licensing Justices* (1) is an authority to shew that they had power to state a case, the power of quarter sessions to do so not being dependent on the Summary Jurisdiction Act, 1857, but being derived from the fact that they are a Court. Our decision upon this point, however, is not to be regarded as a strong authority, for we have not heard the other side, it being unnecessary to call on Mr. Meager as we were in his favour on the merits. With regard to the merits of the case,—the Legislature left it to the confirming authority to determine what places were populous for the purposes of the hours of closing of licensed premises; and what we have to decide is what restrictions are imposed upon the

---

(1) [1906] 1 K. B. 446.

1914

NICHOLAS
v.
DAVIES.

Channell J.

exercise by the confirming authority of that power. Of late years Parliament has given wide powers to local bodies, and, though it is necessary to see that they do not exceed those powers, the Court ought not to infer the existence of any restrictions upon their exercise which do not clearly appear upon the language of the statute. Now the statute provides that the confirming authority may at any time at a meeting specially convened for the purpose decide that a place which has a population of not less than 1000 is a populous place if by reason of the density of its population it is in their opinion entitled to be so considered. But when once that privilege of being regarded as populous has been so conferred upon any place it is not to be taken away until after the publication of the next census. The statute says that " An order restrictive of a previous order shall not be made except on a revision after the publication of a census," and " As soon as may be after the publication of each census the confirming authority of the county shall, at a meeting to be specially convened for the purpose, revise orders then in force within their jurisdiction, and may alter or cancel any of those orders." It was contemplated that after every decennial period there would be fresh materials on which to revise their previous decision, but subject to the condition that they should wait until that period had expired, so that they might have the opportunity of considering the new materials if there were any. There seems to be no limitation on their power to reverse a previous order. There is nothing in the statute which says that they cannot reverse it unless the census shews that the population has decreased. Suppose it be known that the order declaring an area to be a populous place was made upon the basis that the population was so many to the acre, and ten years afterwards when the population in the neighbourhood generally had increased the quarter sessions thought they ought to raise the standard of density per acre, there is nothing in the statute to say that that may not be done. In this case I think the confirming authority had power to make the order which they did. It is not for us to consider whether the reasons upon which they proceeded were sufficient or not, it is enough that they had the power.

1914

Nicholas v. Davies.

Scrutton J. I agree. Upon the preliminary point I desire to add that the whole question of the right of appeal by special case in licensing matters might well be considered by Parliament.

Bailhache J. I agree. The confirming authority may wish to revise the standard of density, and there seems to be no reason why they should not do so if they think proper.

Appeal dismissed.

Solicitor for appellant: *C. H. Newcombe, Swansea.*
Solicitors for respondent: *Jenkins & Lloyd, Swansea.*

J. F. C.

1914
March 23.

THE KING v. NEWINGTON LICENSING JUSTICES.
Ex parte MAKEMSON.

Licensing Acts—Renewal of Licence—Refusal by Compensation Authority to renew—Delay in Payment of Compensation—Refusal of Licensing Justices to grant Further Provisional Renewal of Licence—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 19—*Licensing Rules,* 1910, *rr.* 41, 42, 43.

Rule 41 of the Licensing Rules, 1910, provides that where under s. 19 of the Licensing (Consolidation) Act, 1910, the renewal authority refer the question of the renewal of a licence to the compensation authority, the renewal authority shall grant a provisional renewal of the licence.

Rule 42 provides that where the compensation authority refuse the renewal of a licence, the renewal of which is provisional, the licence shall cease to have effect as from the expiration of the seventh day after the date fixed for the payment of the compensation money.

Rule 43 provides as follows: "Where compensation becomes payable in the case of a licence provisionally renewed, and it appears to the renewal authority at the next general annual licensing meeting after the licence has been provisionally renewed that the compensation money has not been paid and is not likely to be paid before the next fifth day of April, they shall, on a proper application being made for the purpose at that meeting, grant a further provisional renewal of the licence in accordance with the foregoing rules":—

Held, that r. 43 does not limit the power to grant a provisional renewal to one further renewal after the first grant by the renewal authority, but empowers the grant of a provisional renewal as often as may be necessary till the licence is finally extinguished.

In February, 1911, licensing justices referred the question of the renewal of a licence to the compensation authority, and in July, 1911, the compensation authority refused the renewal subject to the payment of compensation. The licence was provisionally renewed by the licensing justices in February, 1911, and again in February, 1912, and in February, 1913. As the compensation money was not likely to be paid by April 5, 1914, an application for a further provisional renewal of the licence was made to the licensing justices in February, 1914. That application was refused as the licensing justices were of opinion that the parties interested in the compensation money had unreasonably delayed the proceedings, and that but for such delay the compensation money would have been paid in such time as to make the application for the further provisional renewal unnecessary. The licensee having obtained a rule nisi for a mandamus requiring the licensing justices to hold a further meeting in order to hear and determine his application for a further provisional renewal:—

Held, that the rule must be made absolute on the ground (*per* Bray and Rowlatt JJ.) that even if there had been delay on the part of those interested in the compensation money, that was no ground for refusing to grant the provisional renewal, and (*per* Avory J.) there was no evidence that there had been any wilful delay by those parties.

Whether personal misconduct by a licensee in the carrying on of the licensed premises after the question of the renewal of his licence has been referred to the compensation authority entitles the licensing justices to refuse to grant a further provisional renewal, *quære.*

RULE NISI for mandamus directed to the licensing justices for the Newington Division of the county of London calling upon them to shew cause why they should not hold a further adjournment of the general annual licensing meeting in order to hear and determine an application for the grant of a further provisional renewal of a licence in respect of premises known as the Rifle Tavern beer-house.

The applicant for the rule, John Makemson, was the lessee of the Rifle Tavern beer-house, and he held the licence attached to those premises, which was an old beer-house licence within s. 18 and the Second Schedule of the Licensing (Consolidation) Act, 1910. On February 27, 1911, the renewal of the licence was referred by the licensing justices to the compensation authority, and on July 4, 1911, the compensation authority refused the renewal of the licence subject to the payment of compensation.

In accordance with r. 41 of the Licensing Rules, 1910, the licence was provisionally renewed by the justices on February 27, 1911, and at the general annual licensing meeting held in February, 1912, the licence was again provisionally renewed in accordance with r. 43 of the Licensing Rules.

On May 14, 1912, a supplemental meeting was held by the compensation authority for the determination of the amount to be paid as compensation, and of the persons entitled thereto. They decided that the persons entitled to the compensation money were Worthington & Co., the applicant, and the latter's daughter, but as no amount was agreed upon by those persons the matter was referred to the Inland Revenue Commissioners, under s. 20, sub-s. 2, of the Act.

At the annual general licensing meeting held in February, 1913, the licence was again provisionally renewed in accordance with r. 43.

On April 23, 1913, the Inland Revenue Commissioners issued their award, determining the sum of 3530*l.* as the compensation money payable in respect of the refusal to renew the licence, and on May 23, 1913, a supplemental meeting was held by the compensation authority to settle the shares of the persons entitled to compensation in that sum of 3530*l.* At that meeting questions arose as to the division of the amount, which the compensation authority considered would be more conveniently determined by the county court, and in accordance with s. 20, sub-s. 3, of the Act, the compensation authority made an order referring those questions to the county court. On July 12, 1913, a copy of that order was received by the applicant's solicitor, and a petition was then prepared and an affidavit sworn in accordance with Order L. of the County Court Rules, and on November 19, 1913, a copy of the order of reference and the petition and affidavit were filed at the Lambeth County Court.

In accordance with Order L., r. 21, of the County Court Rules, the county court judge appointed January 26, 1914, for the hearing of the petition, and on that day the judge determined the value of the interest of two of the persons, but adjourned the case to give the parties an opportunity of agreeing the value of the freehold reversion, and in the event of the parties failing to agree ordered that there should be a further hearing before him or the registrar, at which evidence should be called on the point.

On February 2, 1914, being the date of the general annual licensing meeting, the question of the provisional renewal of the licence was adjourned till February 16, 1914, on which day application was made on behalf of the applicant, in accordance with r. 43, for the further provisional renewal of the licence. The chairman of the justices said that the renewal of the licence had been put back in order that the delay in closing the house might be explained. The applicant's solicitor then explained to the justices all the facts already set out, and referred them to a letter written by him on February 9, 1914, to the compensation authority, and to the reply thereto from the clerk to the compensation authority, dated February 13, 1914. In his letter of February 9 the applicant's solicitor pointed out what had happened in the county court and that, as it was unlikely the parties would be able to come to an agreement, the case would have to go back to the county court judge, and that having regard to the heavy lists of ordinary work it was improbable that a further appointment to hear the case would be obtained for another four weeks or so. The letter then asked, in view of the adjournment of the application for the further provisional renewal, whether the compensation money was likely to be paid before April 5, 1914. To that letter the clerk to the compensation authority replied that it was unlikely that the compensation money would be paid before April 5. The applicant's solicitor also called the justices' attention to r. 43, and to the decision in *Rex* v. *Walsall Justices.* (1) Certain of the justices then expressed the opinion that the brewers had purposely delayed matters for the purpose of retaining the profits arising from the trade done in the house. The applicant's solicitor submitted that in fact the delay had not been caused by the brewers, and that in any event the applicant could not be held responsible for the delay, and that under r. 43 and the decision in *Rex* v. *Walsall Justices* (1) the applicant was entitled by right and in law to the provisional renewal of the licence.

(1) [1910] 2 K. B. 210.

No evidence in opposition to the renewal of the licence was given on oath.

The justices refused the renewal on the ground that the application was not a proper one within r. 43, as there had been unnecessary delay in the prosecution of the proceedings before the compensation committee and the county court, and that but for such delay the compensation money would have been paid in such time as to make an application for the further provisional renewal unnecessary.

The applicant thereupon obtained this rule.

Travers Humphreys, for the licensing justices, shewed cause. The subject of the provisional renewal of a licence is dealt with by rr. 41, 42, and 43 of the Licensing Rules, 1910 (1), and on the proper construction of r. 43 the justices can only grant in respect of a licence two provisional renewals, one under r. 41 when the question of the renewal is referred to the compensation authority, and the second under r. 43 at the next general annual licensing meeting after the first provisional renewal has been granted. This is clear from the words in r. 43 which say that the licensing justices shall grant "a further provisional renewal of the licence." That can only mean one further provisional renewal. If this contention is not well founded, the licensing justices have a discretion under r. 43 to refuse to grant a provisional renewal, and the exercise of their discretion will not be reviewed by this Court. In this case the licensing justices were of opinion that the application was not a proper application inasmuch as in their view those interested in the compensation money were unreasonably delaying the proceedings, preferring to keep the premises open rather than take the compensation money. There was unreasonable delay in filing the petition in the county court. *Rex* v. *Walsall Justices* (1) is not against the present contention. That case only decided that licensing justices on an application for a provisional renewal are not entitled to consider the question of the value of the premises. Lord Alverstone C.J. certainly thought that the justices had a discretion in the matter. At p. 225 he said that the renewal authority could refuse to grant a further provisional renewal if the licensee had been guilty of some misconduct in the carrying on of the business since the preceding general annual licensing meeting.

---

(1) Licensing Rules, 1910, r. 41: "Where, under section nineteen of the Act, the renewal authority refer the question of the renewal of a licence to the compensation authority, the renewal authority shall grant the renewal of the licence in accordance with the terms of the application, but shall insert in the licence a statement as to the renewal of the licence being provisional."

Rule 42: "If the compensation authority refuse the renewal of any licence, the renewal of which is provisional, or, in a case where the renewal is provisional in consequence of the reference to the compensation authority of the question of the transfer or special removal of the licence, refuse the transfer or special removal of the licence, the licence shall cease to have effect as from the expiration of the seventh day after the date fixed under these Rules for the payment of the compensation money."

Rule 43: "Where compensation becomes payable in the case of a licence provisionally renewed, and it appears to the renewal authority at the next general annual licensing meeting after the licence has been provisionally renewed that the compensation money has not been paid and is not likely to be paid before the next fifth day of April, they shall, on a proper application being made for the purpose at that meeting, grant a further provisional renewal of the licence in accordance with the foregoing Rules."

G. Cecil Whiteley, in support of the rule. The contention that under r. 43 of the Licensing Rules, 1910, two or more provisional renewals cannot be granted is not well founded. *Rex* v. *Walsall Justices* (1) decided that where the compensation money is not paid the licensing justices are bound to grant a provisional renewal. They have no discretion in the matter. If it could be shewn in any case to the compensation authority, who have the power to settle the amount of the compensation money, that the parties interested were purposely delaying matters, they could immediately sit and settle the shares themselves. The county court merely advises the compensation authority. On the facts of this case there was no delay attributable to the applicant.

BRAY J. In this case we are asked to grant a mandamus to the licensing justices requiring them to hold a further meeting and at that meeting to hear an application by the present

(1) [1910] 2 K. B. 210.

applicant for a further provisional renewal of his licence. On behalf of the justices it is objected that r. 43 of the Licensing Rules, 1910, does not authorize an application to be made for a provisional renewal except at one licensing meeting and at one alone after a provisional licence has been once granted. Under that rule the first condition is that the licence shall have been already provisionally renewed, and the next condition is that the application shall be made at the next general annual licensing meeting after the licence has been provisionally renewed. We are asked to read the rule as meaning that the licence can only be further renewed once after the licence has been provisionally renewed. I do not think its language compels us to come to that conclusion. As was pointed out in *Rex* v. *Walsall Justices* (1), all this is machinery for carrying out the assessment and payment of compensation. In this case the material dates are these: On February 27, 1911, the question of the renewal of the licence was referred to the compensation authority, and it came before that body on July 4, 1911, when the renewal was refused. In February, 1912, that is the licensing meeting after the provisional licence had been granted, a further provisional renewal was granted, and again in February, 1913. The present application was made in February, 1914. It seems to me that upon the construction of r. 43 the provisional licence which was renewed in February, 1913, was a provisional renewal within r. 43, and that the meeting which was held in February, 1914, was the next general annual licensing meeting after the licence had been renewed. If r. 43 only permits one provisional renewal there was no power whatever to grant a further provisional licence after February, 1912, and although the proceedings were going on and up to that date there was no complaint of delay, the proceedings had not finished by February, 1913. The result therefore of construing the rule as contended for on behalf of the licensing justices would be that no provisional licence could have been obtained in February, 1913, and the premises would have been without a provisional licence. It seems to me that the words of the rule are wide enough to include not only the first renewal but a second and third and

(1) [1910] 2 K. B. 210.

indeed as many as may be necessary. To come to any other conclusion would be interfering with the machinery of the Act. The first point therefore fails.

The next question is whether the justices had power in this case to refuse to grant the provisional licence which they did in February, 1914. They based their refusal on the ground that, as they said, there had been wilful delay on the part of the parties interested in the compensation money. If parties really agree together to delay matters for the purpose of obtaining provisional licence after provisional licence in order to obtain the profits of carrying on the trade and yet receive the compensation in the end, one would wish to find some remedy to prevent such a course of action; but the difficulty is, that if we allowed that as a reason justifying the justices in refusing to grant a provisional licence we should put an enormous discretion in their hands—a discretion which I think I may say has been very arbitrarily exercised in this case if there were any materials upon which to exercise it. Great injustice might be done by allowing them such a discretion. I have therefore come to the same conclusion that I came to in *Rex* v. *Walsall Justices* (1), namely, that this is not a ground for refusing to grant the provisional licence. The rule says that they "shall grant" a provisional renewal. I leave open the question, which I left open in *Rex* v. *Walsall Justices* (1), whether the licensing justices can or cannot consider, on an application for a further provisional renewal, misconduct on the part of an applicant in the carrying on of the premises. I desire to point out that the compensation authority have the remedy in their own hands to prevent any misconduct in the shape of unreasonable delay arising. They have the conduct of the proceedings up to the moment when under s. 20 they have to consider whether they shall refer the matter to the county court. It is, of course, true that it is out of their hands while the amount of compensation is being fixed by the Inland Revenue Commissioners, who are somewhat slow in their movements, but, subject to that, the proceedings are in their own hands till the time comes for the exercise of their discretion as to sending questions for determination by the county court. If before they do that they have the

---

(1) [1910] 2 K. B. 210.

1914

Rex v. Newington Licensing Justices. Makemson, *Ex parte.*

Bray J.

smallest suspicion that there is any undue delay their remedy is to say that unless steps are taken by the parties within a limited time they will reserve to themselves the right to revoke that order. Further, if, after the order is made, none of the parties move, the compensation authority can address themselves to the county court judge, and he, I have no doubt, will use his power to refuse to make any order unless the parties proceed promptly. Therefore the compensation authority and the licensing authority are not without remedy. But it seems to me that great mischief might result if we gave the licensing justices a discretion as to granting or refusing a provisional renewal—a discretion which r. 43 does not give them. The rule must be made absolute.

Avory J. I agree that the rule should be made absolute. Upon the first point, that r. 43 only applies to the next general annual licensing meeting after the licence has been first provisionally renewed, I think a conclusive answer to it is to be found by bearing in mind that unless the amount of compensation money is agreed the matter is to be determined by the Inland Revenue Commissioners subject to an appeal to this Court, and it is therefore obvious that in some cases the amount of compensation money to be paid and the proportions in which it is to be divided may not be determined, as in this case, within two years after such provisional renewal.

On the second point I prefer to base my judgment upon this, that there was in this case no evidence either of misconduct or of wilful delay on the part of the persons interested in the compensation money to justify the justices in exercising their discretion, assuming they have a discretion, under r. 43 to refuse the provisional renewal of the licence. I desire to leave open the point left open in *Rex* v. *Walsall Justices* (1) whether personal misconduct on the part of the applicant, such as committing an offence against the Licensing Acts, might not possibly give the justices a discretion to deal with the matter under r. 43 on the ground that the application was not a proper one, the applicant not being a fit person. I do not, however, wish to be thought to decide that a person who has so misconducted himself cannot make such an application, for the rule may only mean that the application is to be by a person entitled to apply in the proper time.

---

(1) [1910] 2 K. B. 210.

Rowlatt J. I agree that the rule should be made absolute. On the first point I desire to add nothing. As to the second point it seems to me that when a licence is referred for compensation the machinery for the extinction of that licence is to go forward till it reaches its conclusion. Part of the machinery is that until that conclusion is reached the licence is provisionally renewed, which is a permit to carry on the business pending the extinction of the licence. In this case the licensing justices have declined to allow the business to be continued in that way upon the ground, as they say, that the proceedings leading up to the final extinction of the licence have not gone forward quickly enough. It does not appear, however, that they ever warned the parties that they were running any risk. No steps whatever were taken by the compensation authority to cause the proceedings to be hastened. But apart from that, I hold the view that the licensing justices had no power to refuse the renewal as a punishment on the parties for not having gone forward with sufficient expedition with the compensation proceedings. If those proceedings do not go forward quickly enough they ought to be hurried on by the compensation authority. They have the means of doing so. But if the powers at their disposal are insufficient, the remedy is to give them greater powers. They are not entitled to act in the way they have done in this case.

I also desire to reserve the question whether, when the renewal is applied for, the licensing justices have power to refuse it where something has happened in the shape of an offence by the licensee subsequent to his licence being referred for compensation —for instance an offence in the conduct of his premises.

Rule absolute.

Solicitors for applicant: *Linklater, Addison & Brown.*
Solicitor for licensing justices: *G. T. Whiteley.*

J. S. H.

1913
Dec. 19, 20.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* LOCKETT, GRIZZARD, GUTWIRTH, AND SILVERMAN.

Criminal Law—Indictment—Joinder of Counts for Separate Felonies—Discretion of Judge to put Prosecution to Election or quash Indictment.

There is no rule of law that separate and distinct felonies cannot be tried together in one indictment. As a matter of practice and procedure the judge presiding at the trial can in the exercise of his discretion quash the indictment or call upon the prosecution to elect upon which of the counts for felony they will proceed, in order to safeguard the interests of the prisoner and to prevent him from being embarrassed by being put upon his trial upon an indictment in which there are several counts for distinct felonies. In exercising his discretion as to putting the prosecution to their election, the material element to which the judge should direct his attention is whether the overt acts relied on as proving the different offences charged are in substance the same.

APPEALS by the prisoners against their convictions.

The prisoners were tried at the Central Criminal Court upon an indictment containing six counts in all. The first count was for stealing chattels the property of the Postmaster-General out of a postal packet then in course of transmission in England, and the second was for receiving them knowing them to have been stolen. Both these counts were for offences under the Post Office Act, 1908. (1) Counts 3 and 4 were for stealing and receiving—offences under the Larceny Act, 1861 (24 & 25 Vict. c. 96). In this case the property was laid in Mr. Max Mayer. The fifth count was for receiving property stolen outside the United Kingdom; and the sixth was for unlawful possession of property stolen outside the United Kingdom. These last two counts were for offences under the Larceny Act, 1896 (59 & 60 Vict. c. 52). (1)

---

(1) Post Office Act, 1908 (8 Edw. 7, c. 48), s. 50: "If any person— . . . . (c) steals any chattel or money or valuable security out of a postal packet in course of transmission by post; . . . . he shall be guilty of felony, and on conviction shall be liable, at the discretion of the Court, to penal servitude for life or any term not less than three years, or to imprisonment, with or without hard labour, for any term not exceeding two years."

Sect. 52: "If any person receives . . . . any chattel . . . . the stealing or taking, or embezzling, or secreting whereof amounts to a felony under this Act, knowing the same to have been feloniously stolen, taken, embezzled, or secreted, and to have been sent . . . . by post, he shall be guilty of felony, and shall on conviction be liable to the same punishment as if he had stolen, taken, embezzled, or secreted the same, and may be indicted and convicted, whether the principal offender has or has not been previously convicted, or is or is not amenable to justice."

1913

REX v. LOCKETT, GRIZZARD, GUTWIRTH, AND SILVERMAN.

The following is an abstract of the indictment:—

Count 1. That the defendants on July 16, 1913, feloniously stole a pearl necklace, one loose round pearl and two loose pear-shaped pearls, the property of His Majesty's Postmaster-General, out of a postal packet then in course of transmission by post in England.

Count 2. That the defendants on the same date feloniously received the said property knowing the same to have been feloniously stolen out of a postal packet then sent and in course of transmission by post in England.

Count 3. That the defendants on the same date did feloniously steal the said chattels the property of one Max Mayer.

Count 4. That the defendants on the same date did feloniously receive the said last mentioned property knowing it to have been feloniously stolen.

And the indictment avers:—

Preliminary averment to counts 5 and 6. That before the committing of the offences and felonies in the fifth and sixth counts charged and stated to wit on July 15, 1913, the property last aforesaid had been stolen at some place unknown within the French Republic under such circumstances that if the said stealing had been committed in England the person so stealing the said property would have been guilty of larceny to wit the said property had been so stolen unlawfully without claim of right, against the will of the said Max Mayer and with the intention of permanently converting the said property to the use of persons other than the said Max Mayer.

---

(1) Larceny Act, 1896 (59 & 60 Vict. c. 52), s. 1, sub-s. 1: "If any person without lawful excuse receives, or has in his possession, any property stolen outside the United Kingdom, knowing such property to have been stolen, he shall be liable to penal servitude for any term not less than three years and not more than seven years, or to imprisonment for a term not exceeding two years, with or without hard labour, and may be indicted in any county or place in which he has, or has had, the property."

And the indictment further charges:—

Count 5. That the defendants on July 16, 1913, the property last aforesaid before then stolen outside the United Kingdom as last aforesaid feloniously and without lawful excuse did receive and have knowing the said property to have been stolen.

Count 6. That the defendants on the day last aforesaid the property last aforesaid before then stolen outside the United Kingdom as last aforesaid did feloniously and without lawful excuse have in their possession knowing the same to have been stolen.

At the trial an application was made to Lawrence J. before the prisoners pleaded to quash the indictment and, after the prisoners had pleaded, to put the prosecution to their election upon which of the counts for felony they would proceed, but the learned judge refused both applications, and the trial proceeded on the indictment as it stood.

The facts of the case so far as material to this report were as follows. Mr. Max Mayer was a diamond and pearl merchant, with business premises at No. 88, Hatton Garden. He had an agent in Paris by name Salomon, who from time to time sent jewellery by registered post to him at Hatton Garden.

The appellant Silverman occupied an office at 101, Hatton Garden, and in May or June, 1913, he instructed one Gordon, an engraver, to make a boxwood die with the initials "M. M." cut upon it from a wax impression which he handed to Gordon. Gordon accordingly made the die and handed back the wax impression to Silverman. The wax impression was a reproduction of a seal used by Salomon.

On July 15, 1913, a wooden box was despatched by Mr. Salomon in Paris to Mr. Mayer in London by registered post. It contained a pearl necklace said to be worth 135,000*l.* in a leather case, and two drop pearls and one round pearl, together worth 1680*l.*, the two drop pearls being wrapped together in one piece of paper and the round pearl in another piece of paper. The box was wrapped in blue paper and sealed by Mr. Salomon with the seal used by him and bearing Mr. Max Mayer's initials "M. M." and was properly addressed and handed to the postal authorities in Paris and registered. In the course of transit it passed from hand to hand. It passed through the French post office to Calais and thence to Dover, where it was put into the train and passed through the hands of sorters on its way to London. It reached the East Central post office in the early morning of July 16, 1913, where it passed through the hands of a sorter named Sinclair, who said that at the time, as far as could be seen from general observation, the package was intact, and that there was no reason to think it had been tampered with up to that time. The package was given out by Sinclair to a postman named Nevill to deliver at Mr. Mayer's office. On that morning Nevill had packages exceeding the weight that one man is expected to carry, and therefore a bag carrier named Holland was told to assist him. The delivery began at 112, Hatton Garden, and then followed the descending numbers. Silverman had, shortly before this, made a requisition to the postal authorities that letters for him should be delivered at his own office, which was on the third floor, and not be left with the hall porter. When the postmen came to 101, Hatton Garden, each had a bag; Nevill had the bag for the first half of the delivery which contained Silverman's letters; Holland, the bag carrier, had the bag which contained the box of pearls. Nevill and Holland were not called for the prosecution, but they were called for the defence, and said that Nevill took one letter and nothing else out of the bag which he had and went up to Silverman's office, returning in a minute or a minute and a half.

At 94, Hatton Garden, the first bag, i.e., that carried by Nevill, was exhausted, and Holland took it back, leaving Nevill to go on alone with the second bag. At 88, Hatton Garden, Nevill delivered the box registered to Mr. Mayer to the commissionaire, who put it in a safe until a commissionaire in the service of Mr. Mayer arrived. Upon his arrival he was given the package and locked it up in Mr. Mayer's office. Mayer arrived about half an hour later and then opened the box, when it was found that the pearls were missing, and that there was nothing in the box except a portion of a French newspaper and some pieces of French sugar.

The pearls were insured and a description of them was publicly circulated, and a reward of 10,000*l.* offered for their recovery. This came to the knowledge of a man named Brandstatter, who lived in Paris, through seeing the announcement of the reward of 10,000*l.* in the French newspapers. After he had seen the announcement of the reward Brandstatter went to Antwerp, and there on August 4, 1913, met the prisoner Gutwirth, whom he had known for years; Gutwirth on the next day told Brandstatter that he had got Mayer's pearls for sale, and Brandstatter led Gutwirth to believe that he would buy them. Brandstatter returned to Paris, and on August 12 wrote from there to Gutwirth saying "I inform you that I have a buyer for this article." In reply he received in Paris a letter dated August 13 from Gutwirth, who in the meantime had gone to London, asking him to come to London and bring with him "1½," meaning one and a half million francs, and saying that he (Gutwirth) would meet him at the station on his arrival in London. Brandstatter shewed the letter to a cousin of his, one Quadratstein, and they on August 15, 1913, came to London principally to try to gain a share in the reward of 10,000*l.* by posing as confederates of Gutwirth, but in fact aiding in the recovery of the jewels. Upon their arrival in London they were met by the prisoners Gutwirth, Grizzard, and Silverman and discussed openly with them the question of the purchase of Mayer's pearls. The next day (August 16) Gutwirth and Grizzard were at a restaurant with Brandstatter and Quadratstein by an appointment which had been made on the previous day, when the prisoner Lockett came in and sat near them. Grizzard took out a cigarette and asked Lockett for a match, and Lockett threw over to him a matchbox which contained three of the missing pearls.

On August 22 Quadratstein communicated with the underwriters who had insured the jewels and whose name was given in the advertisements offering the reward, and they deputed a Mr. Spanier to act upon their behalf.

Various meetings between Quadratstein, Brandstatter, Gutwirth, Silverman, and Grizzard took place, and on August 25 there was a meeting between Quadratstein, Brandstatter, Grizzard, Silverman, and Spanier at the First Avenue Hotel, Holborn, when

1913

REX
v.
LOCKETT,
GRIZZARD,
GUTWIRTH,
AND
SILVERMAN.

the necklace and the three pearls which Lockett had shewn on August 16 were produced by Grizzard, and three of the pearls were sold to Spanier for 100,000 francs, which was paid by Spanier in French notes the numbers of which had been taken by him. There was no question that the pearls and necklace then produced were those lost by Mayer. Further meetings took place at which there were negotiations to arrange for the purchase of the rest of the pearls, and on September 2 the prisoners were arrested, Mr. Spanier and the underwriters having been in the meantime in communication with the police at Scotland Yard. On all the prisoners were found French bank notes which were identified as those which had been paid by Mr. Spanier on the sale of the three pearls. At Silverman's office a ladle was found such as could be used for melting wax.

Evidence was given by a number of French post office officials who stated that it would be quite impossible in any stage of its progress through the French post office for the package to be opened, its contents taken out, and the package resealed, except in the presence of many persons. Evidence was also given by English post office employees tracing the package from Dover to the East Central district office in London. It was stated that it was utterly impossible for the package to have been opened between Dover and the East Central office in London, and that no one tampered with it at the East Central office. Mr. Max Mayer's correspondence clerk and bookkeeper proved that when the package was opened in Mr. Max Mayer's presence on the morning of July 16 it was found that the leather case was empty and that the box only contained some pieces of French sugar and a piece of French newspaper.

The inference that the prosecution asked the jury to draw from the facts was that the packet containing the necklace was stolen between its leaving the East Central district office in London and its reaching 88, Hatton Garden, about half an hour before Mr. Mayer saw the packet—in other words, that it was stolen while it ought to have been in the possession of the postman who had it to deliver.

The jury returned a verdict of guilty upon the first two counts.

The prisoners appealed upon the grounds (inter alia) that the judge was wrong in law in refusing to quash the indictment and that he was also wrong in law in refusing to put the prosecution to their election on which of the counts they would proceed.

Vachell, K.C., and *Curtis Bennett*, for the appellant Lockett. The felonies under the Post Office Act, 1908, the Larceny Act, 1861, and the Larceny Act, 1896, are separate and distinct independent felonies, and therefore the judge ought to have quashed the indictment or put the prosecution to their election: *Reg.* v. *Heywood* (1); *Rex* v. *Elliott.* (2) The prisoners were embarrassed in their defence. To entitle the jury to convict on counts 1 and 2 there should have been proof that the stealing was in England; but there was no evidence as to where the stealing took place.

Proof of an offence under the Post Office Act, 1908, would disprove the other offences charged. There is no justification for joining two or more different or inconsistent offences. The charges under the Larceny Act, 1896, require proof that the larceny took place abroad. The other counts require proof that it took place in England.

[They also contended that there was no evidence to go to the jury upon the last four counts and that there had been misdirection by the judge upon various matters, but these points are not considered of sufficient importance to call for a report.]

G. W. H. Jones and *A. Crew*, for Grizzard.

Valetta and *D. W. Corrie*, for Silverman.

W. Frampton, for Gutwirth.

R. D. Muir and *Travers Humphreys*, for the prosecution. There is no objection in law to joining any number of felonies in one indictment. The judge has a discretion, if he thinks the prisoner will be embarrassed, either to quash some of the counts or to make the prosecution elect on which count they will proceed.

As a matter of practice it is entirely within the discretion of the judge who tries the case whether he will take either of these courses, or refuse to take either because he thinks the defence will not be embarrassed. It is not a matter for demurrer. If application is made before plea, the judge can quash counts; if made after plea, he can order the prosecution to elect: *Rex* v. *Curtis.*(1) In *Reg.* v. *Mitchel*(2) the whole law is fully stated. *Reg.* v. *Strange* (3) shews that where different felonies are charged, even though the punishments are so different that one is capital, they can be joined.

---

(1) (1864) 9 Cox, C. C. 479.

(2) (1908) 1 Cr. App. Rep. 15.

[SIR RUFUS ISAACS C.J. We need not trouble you further on that point. But can the verdict be justified, by which, on the first two counts, all four appellants were found guilty of both stealing and receiving ?]

The verdict can only be justified by taking these two counts as one indictment; where an indictment charges in different counts larceny and receiving a general verdict may be returned. [Russell on Crimes, 7th ed., vol. ii., p. 1952, and *Reg.* v. *O'Connell* (4) were also referred to.]

Vachell, K.C., in reply. In all the authorities cited for the prosecution the ground of the decision was that the facts necessary to support each count were the same. In the present case in order to support the first and second counts it would be necessary to shew that the theft took place while the articles were in the post. As to the third and fourth counts it would be necessary to shew that the theft took place in England after the transit by post, and as to the fifth and sixth that it did not take place in this country. The counts cannot therefore be joined.

The following judgment of the COURT (Sir Rufus Isaacs C.J., Bray and Lush JJ.) was delivered by

SIR RUFUS ISAACS C.J. This is an appeal by four prisoners who were convicted on an indictment which charged them with stealing and receiving a pearl necklace and three loose pearls.

They were tried and found guilty on two of the six counts of the indictment against them. The two counts upon which they were found guilty were framed under the Post Office Act, 1908, and charged the offences of stealing under s. 50 and of receiving under s. 52 of that Act. The punishment for an offence of this character—whether of stealing or receiving under the Act of 1908—is a maximum of penal servitude for life. It is of

(1) (1913) 9 Cr. App. Rep. 9.
(2) (1848) 6 St. Tr. (N.S.) 599.
(3) (1837) 8 C. & P. 172.
(4) (1843) 5 St. Tr. (N.S.) 2.

importance, therefore, apart from other questions, to determine whether or not the offence in question had been proved, whether a proper direction had been given to the jury, and again whether this indictment so framed was good in law or ought to have been put before the jury in the form in which the learned judge put it. There were four other counts. The first of those two—that is, counts 3 and 4—was for stealing, the property being laid in one Max Mayer, and the fourth count was for receiving the same property. These offences were charged under the Larceny Act, 1861, and under those counts the theft must have taken place in this country. Then there are further counts, count 5 being under s. 1 of the Larceny Act, 1896, for receiving goods stolen outside this country, and in respect of which an offence of larceny would have been committed if the goods had been stolen in this country. The sixth count is for being in unlawful possession of goods which had been stolen outside this country, in both counts 5 and 6 it being, under the Larceny Act, 1896, part of the necessary averment in the count that the prisoners knew at the time of receiving or of being in unlawful possession that the pearls had been stolen.

It is unnecessary to recapitulate the facts except to say that at some time during the course of transmission by post a pearl necklace and pearls which were being forwarded by one Salomon in Paris to Mr. Max Mayer, of Hatton Garden in London, were stolen, and that some persons were in receipt of these stolen pearls. The pearl necklace was of very great value, put at about 135,000*l*., and the pearls also were of very considerable value apart from the necklace. It may perhaps be said—it is unnecessary for us to go into particulars with regard to it—that the exact moment at which the pearls were stolen has not been made clear. It is quite unnecessary that it should. The facts in the case when examined and as proved at the trial disclosed as clearly as could possibly be disclosed the offence in fact of which the four prisoners were convicted.

It would, I think, only be a waste of time to go through the evidence that was given at the trial, because it is so plain that, looking only at the facts and apart from the law, there is really no defence which could be made, and on behalf of the prisoners

Mr. Vachell has quite properly relied upon the only points on which arguments could be put forward, based upon the legal aspect of the case and the practice and procedure adopted by the judge as distinguished from a defence upon the merits. That, of course, does not absolve this Court from examining with care the arguments put forward to us as the points upon which it was desired to obtain a decision.

The first point taken by Mr. Vachell on behalf of the defendant Lockett and relied upon by counsel for the other defendants (who adopted his argument throughout) was that the indictment was bad for misjoinder, and I think I am doing no injustice to the admirable and concise argument which he addressed to us upon this and other points if I say that this was the most substantial and the main point upon which he based his appeal. It is said that the indictment was bad for misjoinder, and that therefore the learned judge at the trial ought to have quashed the indictment upon motion made to him before plea; that if he did not do that, he ought to have put the prosecution to their election to determine upon which of the various counts they would proceed; and further that even if he did not take that course he ought to have ruled, at the end of the case for the Crown, that there was no evidence upon any of the counts other than the first and second, and further that, even if he did not take that view at the end of the case for the Crown, he ought upon the whole of the evidence and without any summing up to have taken that view and have so directed the jury.

The main proposition involved in these contentions is that there were in this case three distinct and separate felonies alleged in the counts. In substance it amounts to this, that there were in the journey three sections in the course of which the larceny of these pearls may have been committed, either in France, or when in the custody of the Postmaster-General, or after the pearls had been delivered by the postal officials in England, and in the first case the offence of larceny would not be committed, although under the Larceny Act, 1896, the offences of receiving or of being in unlawful possession of the pearls, knowing that they were stolen in France, could still be committed.

Now, apart altogether from the Larceny Act, 1861, and the

Larceny Act, 1896, and simply from the point of view of common law and practice and procedure, it is said that these offences could not be charged together in one indictment. It is to be borne in mind that there is no rule of law which says that various distinct felonies cannot be charged in separate counts in one indictment. No doubt as a matter of practice and procedure, and subject to certain exceptions, the practice is well known and well established that if there are more offences than one in an indictment for felony, the judge can, if he thinks it right, call upon the prosecution to elect upon which of those counts they intend to proceed. But it is said in this case that he was bound to do so.

We have to consider the various authorities that have been cited to us and see what principle is to be deduced from them. It is clear from the authorities cited and very carefully considered and collected in *Reg.* v. *Heywood* (1), which it is therefore unnecessary for us to go through seriatim, and also from the very careful review of the authorities in *Reg.* v. *Mitchel* (2), that the rule is not a rule of law, but is a matter of discretion for the judge. To use the words of Buller J. in *Young* v. *Rex* (3), cited in *Heywood's Case* (1), these are "matters of prudence and discretion," and that means in substance that if he thinks that the prisoner will be embarrassed by being put upon his trial on an indictment in which there are several counts for distinct felonies, the judge, in order to safeguard the interests of the prisoner and to protect him from any oppression—from any prejudice—should either quash the indictment if he thinks it right, or should make the prosecution elect upon which of the counts they will proceed. That is the whole foundation of the notion which exists and which has been put forward at various times, that the judge is bound either to quash the indictment or to put the prosecution to election.

In *Reg.* v. *Heywood* (1) and *Reg.* v. *Mitchel* (2) the authorities reviewed were in substance the same, and the two cases contain a reference to all the authorities to which it is necessary to call attention. From the view expressed by Buller J. in *Young* v.

(1) 9 Cox, C. C. 479.

(2) 6 St. Tr. (N.S.) 599.

(3) (1789) 3 T. R. 98.

1913

REX
v.
LOCKETT,
GRIZZARD,
GUTWIRTH,
AND
SILVERMAN.

Rex (1) to which I have referred, which is in substance the same as that expressed by Parke B., after very careful consideration, quoted in *Mitchel's Case* (2), it is apparent that in dealing with these and similar questions which arise upon indictments we are only dealing with matters of practice and procedure devised by the judges who have presided in the past at criminal trials, for the purpose of protecting prisoners from oppression, and that they are not laid down as, and are not, rules of law, but are guides to the course which will and can in such circumstances be adopted by judges, which will entitle them, if as a matter of prudence and discretion they think it right, either to quash the indictment or to call upon the prosecution to make its election. In *Rex* v. *Blackson* (3), a case referred to in *Mitchel's Case* (2), Parke B. said: "The reason why counts ought not to be joined in an indictment against a prisoner for stealing and also for receiving is because they are in fact totally distinct offences, and a prisoner cannot be found guilty of both." Of course it must be borne in mind that he is dealing there with the law as it existed before the Act of 1861 was passed with the special sections providing for counts in the same indictment for stealing and receiving. He continues: "But in cases where two charges are not repugnant they may be properly joined as in indictments for forgery, where one count is inserted for the forging, and another for the uttering the forged instrument. In such a case the prisoner might be convicted of both charges, and here also a conviction on both counts might take place. The two facts charged form part of one and the same transaction, and cannot possibly embarrass or confuse the prisoner in making his defence. The prosecutor cannot, therefore, be put to his election, and the trial must go on." The passage in the judgment of Buller J. in *Young* v. *Rex* (1) referred to in *Mitchel's Case* (2) and also in *Heywood's Case* (4), from which I have already quoted a sentence, is important and is as follows: "In misdemeanours the case in Burrow"—that is *Rex* v. *Benfield* (5)—"shews that it is no objection to an indictment that it contains several charges. The

(1) 3 T. R. 98.
(2) 6 St. Tr. (N.S.) 599.
(3) (1837) 8 C. & P. 43.
(4) 9 Cox, C. C. 479.
(5) (1760) 2 Burr. 980.

1913

Rex v. Lockett, Grizzard, Gutwirth, and Silverman.

case of felonies admits of a different consideration; but even in such cases, it is no objection in this stage of the prosecution"—a writ of error. "On the face of an indictment every count imports to be for a different offence, and is charged as at different times. And it does not appear on the record whether the offences are or are not distinct. But, if it appear before the defendant has pleaded, or the jury are charged, that he is to be tried for separate offences, it has been the practice of the judges to quash the indictment, lest it should confound the prisoner in his defence, or prejudice him in his challenge of the jury; for he might object to a juryman's trying one of the offences, though he might have no reason to do so in the other. But these are only matters of prudence and discretion. If the judge who tries the prisoner does not discover it in time, I think he may put the prosecutor to make his election on which charge he will proceed." Those are very plain and clear authorities from which we deduce the practice and procedure to which I have already alluded, which shew that it is a matter of discretion for the Court to determine whether or not either one or the other of those courses should be pursued.

It has also been contended on behalf of the appellants that although it may be a matter of discretion, it is a matter of judicial discretion, and the judge would be bound in such a case as the present, if he has not quashed the indictment, to put the prosecution to election. That involves the consideration of the overt acts which in substance are relied upon by the prosecution. In our view that is the material element to which attention should be directed in determining whether or not the judge should exercise his discretion. He has to see that the prisoner will not be embarrassed in his defence, and in determining that point he has to consider whether the overt acts relied upon in support of the offences charged in the counts of the indictment are in substance the same for each offence. It is apparent that if the facts are in substance the same, the overt acts relied upon are the same, and if the overt acts are the same, then there is no repugnance in these counts, and the consequence is that they may be charged together in one indictment, and there is no ground upon which we can say that the judge was bound to put the prosecution to its election. In this connection it is right that we should note the argument addressed to us by Mr. Vachell, who says, "No doubt that is the law and the right practice," and indeed he quoted to us *Reg. v. Heywood* (1), which stated the law as I have stated it; but he says that in this case the overt acts are not the same, and in support of that contention he says in effect, "You have here to consider that the offence may have been committed in France, which is not the same as saying that the offence was committed in England, and it may have been committed in transmission in the post, nobody knows where it was committed." It is no doubt true that in a great many cases you may not be able to fix the exact spot or time at which a particular offence charged was committed, but the Court has to ascertain whether in substance the acts charged are the same. In the present case there was a theft of these pearls at some point during what may be described as the one transaction of the sending of the pearls by Mr. Salomon in Paris to Mr. Max Mayer in London. We think that the learned judge was quite right in the view which he took, and that in these circumstances there was nothing which made it incumbent upon him to exercise his discretion in the way suggested, and that therefore these points fail. [His Lordship then commented upon the summing up by the learned judge at the trial and held that there was no ground of complaint with regard to it, and continued:]

I may add that in our view it is not possible to convict any of these four defendants both of stealing and of receiving the same pearls. It was, of course, open to the jury to find that one or other of the prisoners had stolen the pearls and that one or other had received them, but they have found a verdict against each of the four prisoners on the two counts. It has no practical value in this case, because we are dealing with exactly the same facts with regard to which, on any finding, whether one prisoner is regarded as guilty on the first charge and another as guilty on the second, both would certainly receive the same sentence. No doubt Mr. Muir is right in saying that in substance what was intended was to find them guilty on the indictment. In form—I only call attention to it so that it may not be thought that the

---

(1) 9 Cox, C. C. 479.

1913

REX
v.
LOCKETT,
GRIZZARD,
GUTWIRTH,
AND
SILVERMAN.

point has been overlooked—the conviction of all the four prisoners on the two counts is not right, but, for the reasons which we have already given, that has no value in this case and does not affect the sentences which have been pronounced upon these prisoners.

Therefore the conclusion to which we come is that these appeals must be dismissed. As no leave to appeal was given, the sentences will run from the present date.

Appeals dismissed.

Solicitors for appellants Lockett and Grizzard: *Margetts & Jenkins.*

Solicitors for appellants Gutwirth and Silverman: *Osborn & Osborn.*

Solicitor for prosecution: *The Director of Public Prosecutions.*

J. E. A.

C. A.

1913

Dec. 9, 10.

[IN THE COURT OF APPEAL.]

OXLEY AND OTHERS v. LINK.

Practice—Judgment—Amendment—Accidental Slip—Judgment wrongly entered against Married Woman—Order XXVIII., r. 11.

By Order XXVIII., r. 11, "clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a judge on motion or summons without an appeal."

The plaintiffs signed judgment in default of appearance against the defendant, a married woman sued in respect of her separate estate. By mistake the judgment was drawn up in the ordinary form of a personal judgment against the defendant instead of in the appropriate form laid down by the Court of Appeal in *Scott* v. *Morley* (1887) 20 Q. B. D. 120. The plaintiffs having taken out a summons for leave to amend the judgment so as to follow the form of judgment prescribed in the case of a judgment against a married woman upon a contract made during coverture, a Master and a judge at chambers declined to make any order upon it:—

Held by Vaughan Williams L.J. and Buckley L.J. (Kennedy L.J. dissenting), that the plaintiffs were proposing not to make a correction in the judgment but to substitute one form of judgment for another, and that Order XXVIII., r. 11, had no application to the case.

Held by Kennedy L.J., that the case fell within Order XXVIII., r. 11, but that the Master and judge had under the circumstances rightly exercised their discretion in refusing to make the amendment.

APPEAL of the plaintiffs from an order of Bucknill J. made at chambers. The facts were briefly as follows.

On June 24, 1903, the plaintiffs issued a writ against the defendant, who was described therein as "a married woman sued in respect of her separate estate."

On July 8, 1903, they signed judgment against the defendant in default of appearance. By an error this judgment was not signed in the form given in *Scott* v. *Morley* (1), as the appropriate form of judgment in the case of a married woman sued in respect of her separate estate, but was a judgment in the ordinary form. It was in the following terms: "The defendant, E. Gertrude Link, not having appeared to the writ of summons herein, it is this day adjudged that the plaintiffs recover against the said defendant, E. Gertrude Link, 285*l.* 15*s.* and 4*l.* 14*s.* costs." In it, however, the defendant was described in the same terms as in the writ of summons, as "E. Gertrude Link, a married woman sued in respect of her separate estate."

No steps were taken to enforce the judgment until the year 1913, when an application was made by the plaintiffs to examine the defendant as to means. Upon this an objection was taken, on October 21, 1913, that the judgment signed against the defendant was wrong. On October 28, 1913, a summons was issued by the plaintiffs asking that the judgment of July 8, 1903, be corrected and amended so as to follow the form of judgment prescribed in the case of a judgment against a married woman upon a contract made during coverture, and the defendant took out a cross-summons to set aside the judgment. The summonses were heard together before the Master; he made no order on the plaintiffs' summons for leave to amend, but upon the defendant's summons he ordered that the judgment be set aside and that the defendant deliver her defence within fourteen days. The plaintiffs appealed to Bucknill J., who affirmed the Master's order. The plaintiffs appealed to the Court of Appeal.

(1) 20 Q. B. D. 120.

John Sankey, K.C. (*R. M. Montgomery* with him), for the plaintiffs. This is the case of an "error arising therein from any accidental slip or omission" which ought to be amended under Order XXVIII., r. 11. (1) A judgment against a married woman is up to a certain point in the same form as an ordinary judgment against an ordinary defendant who is not a married woman, and what the plaintiffs want is not the substitution of one judgment for another, but the addition of something to their judgment which has been accidentally omitted from it.

[VAUGHAN WILLIAMS L.J. This judgment was signed by default, and no judicial mind has been applied to it.]

The answer to that criticism is that, if it is correct, the slip rule cannot be made use of in the case of judgments by default; but *Armitage* v. *Parsons* (2) and *Muir* v. *Jenks* (3), in both of which cases the slip rule was made use of, were both cases of judgment by default. Apart from that rule the Court has an inherent jurisdiction to correct mistakes in judgments or orders so as to give effect to its meaning and intention, as in *Shipwright* v. *Clements* (4), where a judgment declaring the plaintiff to be entitled to an injunction was altered by limiting its duration to ten years; see also *In re Swire* (5); *Muir* v. *Jenks.* (3) [They also cited *Anlaby* v. *Prætorius.* (6)]

McCardie, for the defendant, was not called upon to argue.

1913. Dec. 10. VAUGHAN WILLIAMS L.J. In this case the Master arrived at a conclusion, and there was an appeal to the judge, who arrived at the same conclusion; that is to say, if it was a mere question of discretion, the discretion of the Master and the discretion of the judge were identical. They both thought that it was not a case in which the amendment asked for ought to be made. We are asked to decide this case on the ground that the question whether a thing ought or ought not to be done is a question of discretion. If we find both the Master and the judge exercising the same discretion, it ought to be a very, very strong and peculiar case to make us say that the discretion exercised by the Master and then by the judge was wrong. But I, speaking for myself, would rather not decide this case upon any such grounds. I propose to decide it simply upon the ground that this case does not come within the slip rule at all. Order XXVIII., r. 11, runs thus: "Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a judge on motion or summons without an appeal." Those are the words, and there was so much difficulty over the words "clerical mistakes in judgments" that I rather thought Mr. Sankey preferred not to rest his appeal upon those words, that is to say, not to base his argument that this case came within the slip rule upon the words "clerical mistakes in judgments." He preferred to rely upon "or errors arising therein from any accidental slip or omission," and to say that his case came within those words. I again say that the same objection which arises in respect of the words "clerical mistakes in judgments or orders" in my opinion arises in respect of the words "errors arising therein from any accidental slip or omission." What is "therein"? That is in the judgment. It is exactly the same thing. "Clerical mistakes in judgments" only covers the same area, neither greater nor smaller, as you get from the words "errors arising therein from any accidental slip or omission"—that is in judgments or orders. Under those circumstances, I come to the conclusion that this slip rule does not apply in the present case. The real fact of the matter is that what is asked for here by the judgment creditors, if I may call them such, is this, not that there may be a correction in the judgment or order, but that they may substitute for the judgment or order which has been made something which is a wholly different judgment. I heard Mr. Sankey say this morning that all that was wished to be done here was to add an omitted clause; but it is not so. The proposal is to substitute one form of judgment or order for another. He has no desire, as I understand it, to make any correction at all.

---

(1) By Order XXVIII., r. 11, "Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a judge on motion or summons without an appeal."

(2) [1908] 2 K. B. 410.

(3) [1913] 2 K. B. 412.

(4) (1890) 63 L. T. 160.

(5) (1885) 30 Ch. D. 239.

(6) (1888) 20 Q. B. D. 764.

I do not wish to say anything with regard to the practice when judgments are signed. It is said that the officers either do or ought to examine for themselves the order and see that it is a right one. So far as that is concerned, there never was any difficulty in the days of the Common Law Procedure Act and before the Common Law Procedure Act in going to the judge, if one of those orders was wrongly drawn up either by the judgment creditor or by the clerk in the office, and putting it right. Since the Judicature Act there has been a difficulty in some cases, because if the judge had the matter before him and made an order, and that order was wrongly drawn up, there might be a difficulty, because a judge had no right, since the Judicature Act, to rehear an application in any form. Therefore, I doubted myself whether the slip rule was intended to apply in this case. I only mention the doubt; I do not propose to base my judgment upon that. I propose simply to base my judgment upon the ground that in this case the amendment which has been asked for does not come within the slip rule at all. I have put in writing my summing up of my view:—The application in this case is not an application to amend anything in the order or judgment—anything "therein." It is not an application to amend anything therein, but the application is to amend the order by striking out this order and by allowing to be substituted the form of order which is prescribed in the case of judgment against a married woman for the order which was made, which was the general order given in the case of judgment against any man or woman in a case where judgment is signed in default of appearance. They wish to substitute for that form the *Scott* v. *Morley* (1) form of judgment.

BUCKLEY L.J. On June 24, 1903, the plaintiffs, the appellants before us, issued a writ against a defendant who was described as "E. Gertrude Link, a married woman sued in respect of her separate estate." On July 8, 1903, they signed this judgment: "The defendant, E. Gertrude Link, not having appeared to the writ of summons herein, it is this day adjudged that the plaintiffs recover against the said defendant E. Gertrude Link 285*l.* 15*s.* and 4*l.* 14*s.* costs." That judgment was headed, as the writ had been headed, with a description of the parties, which included "E. Gertrude Link, a married woman sued in respect of her separate estate." In the first instance let me say why, in my judgment, that judgment was wholly wrong. In *Scott* v. *Morley* (1) the matter was much discussed. That is a well-known case in which the form of order was settled upon an application under s. 5 of the Debtors Act, 1869, to commit a married woman for disobedience to an order of this kind. The judgments delivered are addressed to considering what were the remedies before the Debtors Act, 1869, in respect of the issue of a writ of capias ad satisfaciendum and what was the new course of procedure under the Debtors Act. The Court went into an elaborate consideration of whether after the passing of the Married Women's Property Act, 1882, there was any personal liability in the married woman; whether the result of it was not that the creditor had a remedy only against property and no remedy against the person. Upon that Bowen L.J. (2) says this: "When the Act of 1882 gave to a married woman a legal capacity of entering into contracts, it was intended to limit the extent of her liability upon them, and the question is to what extent is it limited. Sub-s. 2 of s. 1 says that a married woman shall be capable of rendering herself liable in respect of and to the extent of her separate property on any contract. It appears to me that those words taken in their natural sense do not create any personal liability; they only subject the married woman to a proprietary liability. I think that a judgment recovered against a married woman by virtue of those earliest words would not subject her to a personal liability as distinguished from a liability in respect of property. Then sub-s. 2 goes on to say that she shall be capable of 'suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant or be made a party to any action or other legal proceeding brought by or taken against her.' This makes a considerable alteration in the mode of legal procedure by or against a married woman. Finally, we come to the result of the suit, that which the plaintiff is to take under his judgment, 'any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise.' The only means of satisfaction of the judgment there indicated are to be found in her property, not in her person." Then, passing over a sentence, he goes on: "Such a judgment is not like a judgment for a debt at common law, and it seems to me therefore that if the Debtors' Act had not been passed it would not have given the creditor any right to take the woman's body in execution." The Lord Justice plainly stated what the married woman's liability is; it is not personal; it is what he calls proprietary, that is to say, it is a right to reach a particular fund; the person is not liable, the fund is. Fry L.J. at p. 131, says this: "If the Act of 1882 had been passed before the Act of 1869 could a ca. sa. have been issued against a married woman upon such a judgment? In my opinion it could not, and for this simple reason, that the judgment is limited to a particular fund and creates no general personal liability." The form of order was settled in *Scott* v. *Morley*. (1) It proceeds upon the footing that there is no personal liability, but only what the Lord Justice calls a proprietary liability in the case of a married woman.

---

(1) 20 Q. B. D. 120.

---

(1) 20 Q. B. D. 120.
(2) 20 Q. B. D. at p. 128.

Turning to the judgment which the plaintiffs took, it is a judgment declaring, affirming, and by an order of the Court enforcing a personal liability. "It is this day adjudged that the plaintiffs recover against the defendant E. Gertrude Link" so much money. That will be enforceable according to its terms in due course of law. That judgment appears to me to have been wholly wrong. In 1913 there was an application to examine the married woman as to means for the purpose of enforcing this judgment. An objection was then taken, dated October 21, that the judgment was wrong. Thereupon, on October 28 the plaintiff issued a summons asking that the judgment of July 8, 1903, should be corrected and amended so as to put it in the *Scott* v. *Morley* (1) form, and somewhere about the same time (I have not the date) an application was made by the defendant to set aside the judgment. Those two applications were heard before the Master on

(1) 20 Q. B. D. 120.

November 5, 1913. He made no order on the plaintiffs' summons to amend, and on the defendant's summons he ordered that the judgment be set aside, and he went on to order "that the defendant do deliver her defence within fourteen days," and so on. That was taken to the learned judge, and the judge affirmed the Master. The question is whether that order is right. In my opinion it is right.

It is argued that this is a judgment which can be set right under the slip rule, Order XXVIII., r. 11. The words relied upon are: "errors arising therein," that is to say, in a judgment—errors arising in a judgment "from any accidental slip or omission may at any time be corrected by the Court or a judge on motion or summons without an appeal." To my mind an error in something means that the thing of which you are speaking contains parts which are right and parts which are wrong, and that you are going to alter so much of it as is wrong. It is not correcting an error in a thing which is wrong from beginning to end to substitute for it something which is right. In order to see if this Order applies I have to see whether this judgment contains something which is right and which I am to correct by adding something, if it be a mistake which arises from omission, or by correcting something, if it be something which requires modification or correction of some sort. So that to see whether the Order applies or not, it is vital in the first instance to see whether this is a document parts of which are right and parts of which are wrong. If I am right in what I have said already, there is no part of it which is right; it is wrong altogether. For that reason it seems to me that the slip rule does not apply.

It has been suggested in the course of this discussion that the slip rule does not apply to default judgments. There is nothing in that point to my mind. The slip rule is one which is generally applicable. It is not a question of the mind of the Court having been addressed to it or of its having been a judgment by default or anything of that sort. I have to look at the judgment as it is, the act of the Court, and say whether the slip rule applies to it. For the reasons I have given I do not think the Order does apply to it. Further, even if the Order did apply to it, I should have no doubt myself that the only proper order in this case is to discharge this judgment and leave the plaintiffs, if they are so entitled, to obtain some other judgment. That is what the order of the Master has done. He has not dismissed the action, he has discharged the judgment, and has given a direction as to the defendant's delivering a defence within fourteen days, and if they are so minded the plaintiffs can go and make what they can of it. It is not material to my mind to consider the time which has elapsed from 1903 to 1913. Whether some plea of the Statute of Limitations or something else may be set up, or laches or anything else, I do not know. It appears to me that that ought to be open to the defendant, and that she ought not to be held bound by a judgment which for reasons which I have given seems to me to be wrong, with an amendment to be made ten years afterwards so as to preclude her from setting up such defences, if any, as she has.

Under those circumstances, it appears to me that the order appealed from is right, and that this appeal ought to be dismissed with costs.

KENNEDY L.J. For the reasons that I shall proceed very shortly to state I do not differ from the rest of the Court in dismissing this appeal, but the application of this rule appears to me to be of very great importance, and I have the misfortune to differ from my brethren upon one point upon which judgment dismissing the appeal in their view ought to be given. The rule is a very beneficial one: it is a rule which gives a judge or the Court on motion or summons power to remedy either clerical mistakes in judgments or orders or errors arising therein from any accidental slip or omission. In my view the application in this case is one as to which the plaintiffs were entitled to appeal to the discretionary power of the judge and say that in fact the thing which they wanted remedied was an accidental slip or omission. I cannot myself limit the words as narrowly as they have been limited. The slip or omission must be an important one, otherwise you do not want to remedy it. It is no use to make a rule correcting slips or omissions that are of no sort of importance. The question is more whether or not the thing which is asked for is a thing, as it seems to me, which in discretion ought to be amended, and it matters not how great in importance the slip or omission may be.

Now, in this case the action which had been brought against this lady on its face is an action against a married woman, and although I of course, as I am differing from my colleagues on this point, feel that I am probably wrong, I must express, because I am clearly of that opinion, the opinion that the nature of the error in this judgment is not one which ought to be treated as such as to make the judgment a nullity, which is what is meant when it is said that the judgment is wholly wrong. In *Scott* v. *Morley* (1) what the Court did was to draw up a form. The action was not a question on the form, it was a question as to the right to imprison as debtor a married woman on a certain judgment, but it is to be noticed, though I think it sometimes escapes notice, that the form of the proceedings in which the judgment was obtained was a form in which there was a limitation. The form of the judgment appears at p. 121 of the report. The order did direct that execution should be limited to the separate estate of the wife not subject to any restraint on anticipation, unless by reason of s. 19 of the Married Women's Property Act, 1882, such estate should be liable to execution notwithstanding such restraint, and as I understand the judgment and the form which has been adopted in accordance with it, all that appears upon this writ is, so far as it goes, regular and right, namely, the entry of a judgment against the defendant. Bowen L.J., I think, makes that clear in a passage in his judgment in *Scott* v. *Morley* (1), which has not been cited, at p. 130. He said: "I think that the judgment in the present case has been in substance drawn up with a true view of the effect of sub-s. 2, though I think it is not exactly right in form. In my opinion the judgment ought to follow the words of the Act." Thereupon the Court drew up that judgment. It is to be observed that the judgment as directed in *Scott* v. *Morley* (1) does not merely make a declaration that money is payable out of a certain fund; it proceeds, "It is adjudged that the plaintiff do recover" so many pounds "and costs to be taxed against the defendant (a married woman)." That is the form which is followed in this judgment. It is quite true that there was then put, in order to comply with the terms of the statute as the Court of Appeal held that the statute ought to be understood, "such sum and costs to be payable out of her separate property as hereinafter mentioned and not otherwise," and then it proceeds to limit the execution. The judgment, as drawn up in the present case, does seem to me, I confess, to come within the nature of a slip, seeing that on the face of the judgment it is a judgment against a married woman, and the only fault is that those limiting words have been omitted. It is perfectly right that it is a judgment against the defendant. The omission of the special limitation in this case is no doubt an important omission, but, as I have already said, it is important omissions which are intended to be included, and certainly ought not to be excluded from the operation of the Order. There has been accidentally, and nobody suggests that it was otherwise, a slip or omission of the limiting words; and I think myself that if that judgment as drawn up with "married woman" upon the face of it had been handed to a sheriff and he had proceeded to levy against her property generally it would be at least arguable that he would have had clear notice that the law had said that as against a married woman the proceeding should only be against certain property. I feel that there is power to correct the fault in the form of the judgment, but one has further to see then how the discretion ought to be exercised.

---

(1) 20 Q. B. D. 120.

Now, as to that there are several considerations which we have to take into account. We have to consider whether it is an application made by the defendant, which I call a defensive application, or an offensive application by the person who has been, so to speak, a party to obtaining that which has been, through accidental slip or omission, in fact a wrong judgment to the extent of the accidental slip or omission. The case before North J. which was cited appears to me to be on that ground distinguishable. It was an application by the defendant that an order which unquestionably could only have been made in one way should be set right because it had been drawn up in another and a different way, and all the equities, so to speak, that one can imagine were in favour of the application that was made. That has been, I think, rightly quoted as to what one may call of recorded instances the largest correction that has so far been made under the rule. Secondly, I cannot leave out the fact that in this case the plaintiffs must be taken through their solicitors to have had notice of the error at least ten years ago. Bowen L.J. in *Swire's Case* (1) said in giving judgment: "I think the true view is, as stated by Cotton L.J., that every Court has inherent power over its own records as long as those records are within its power, and that it can set right any mistake in them. It seems to me that it would be perfectly shocking if the Court could not rectify an error which is really the error of its own minister." But while that may be so, and I take the judgment by default in the present case to have been drawn up by an officer of the Court, the mistake, if mistake there was, was one in which, when the representative of the plaintiffs took away the copy, which in fact was a copy of something that he had himself filled up and which had received ministerial sanction, he saw or ought to have seen that the form of judgment, which was one against a married woman, was not in accordance with the law, and that the judgment executed as an ordinary judgment would be entirely wrong. The plaintiffs must be taken to have known what the error was. They have taken no step during that time that I know of that can help them. If they have taken any steps (and one was suggested), they have taken no step which can put them in a better position. If any step was taken ten years ago, they had reason then to look at the form and see if the form was wrong. I do not know what has happened during these ten years. The omission, if it be an omission or an error, is an important one, and I do not know what may or may not have been this lady's pecuniary position during all that time, but her case is made the subject of this application ten years afterwards. If it was, as it is said, a duty of the plaintiffs not to have a wrong judgment recorded in proceedings by default, they have failed in the duty for all these years. If it had been the defendant here applying to remedy the judgment, I think the considerations which were held to avail

---

(1) 30 Ch. D. at p. 247.

C. A.
1913

OXLEY
v.
LINK.

Kennedy L.J.

in the case before North J. might have availed here; but it is the plaintiffs who for reasons of offence and not defence have made this application now, and the tribunal of the Master and the tribunal of the judge have both said that in their discretion, the rule being one which appeals to discretion, they are not prepared to make the order, and I am not going to reverse their decision. It seems to me that you have always to make out a considerable case after such a lapse of time, and you ought certainly to make out a stronger case where that which you seek to amend is or may be of material importance.

Under those circumstances, I think that I cannot say that the discretion, which is prima facie that of those two tribunals, has been wrongly exercised. No sufficient ground has been shewn why we should reverse the exercise of the discretion, and, therefore, while I hold that the case is one which was the subject of amendment at discretion and the discretion might be exercised in favour of the applicant, I think that the amendment ought not to be made in the particular circumstances of this particular case.

VAUGHAN WILLIAMS L.J. I wish to make an observation about my own judgment. It has occurred to me that there possibly may be a mistake as to my expression of doubt as to the application of Order XXVIII., r. 11, to orders drawn up by those who perform ministerial duties. Order XXVIII., r. 11, was wholly unnecessary, even after the Judicature Act, in such a case. It is only in the case of judicial orders in the exercise of judicial discretion that such an Order as Order XXVIII., r. 11, is necessary. I meant to say that I hold that, quite irrespective of Order XXVIII., r. 11, the judges have the power and the duty to correct mistakes which are made by their officers in the performance of their ministerial duties of drawing up orders of judges. I think that Buckley L.J. mentioned that we agree in dismissing this appeal with costs. That is the order of the Court.

Appeal dismissed.

Solicitors for plaintiffs: *Janson, Cobb, Pearson & Co.*
Solicitors for defendant: *Kenneth Brown, Baker, Baker & Co.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.

1914

March 2.

OESTERREICHISCHE EXPORT A. G. VORM. A. JANOWITZER v. BRITISH INDEMNITY INSURANCE COMPANY, LIMITED AND OTHERS.

[1913 O. 1382.]

Practice—Parties—Joinder of Defendants—Separate Causes of Action—Policy underwritten by Defendants for Separate Amounts—Service out of Jurisdiction—"Necessary or proper party"—Rules of the Supreme Court, 1883, *Order* XI., *r.* 1 (*g*); *Order* XVI., *r.* 4.

The plaintiffs, who were export merchants carrying on business in Vienna, brought an action against two insurance companies upon certain policies of marine insurance on goods. One of the companies was registered as a limited company in England and the other in Scotland. The policies were in identical form, and were drawn up at Antwerp in the French language and were signed by a common agent for both companies. Each policy was for a certain amount upon goods carried in a named ship, and it stated that the undersigned insured respectively the amounts stated by each of them at the foot thereof. At the foot each company was stated to insure in halves for the total sum insured, and against the name of each company, who were described as of London, was placed a figure representing one half of the total amount insured. The companies had a common office and a common secretary in London, and in all letters written by them to the plaintiffs' solicitors relating to the matter the London office was described as the head office of the companies. The plaintiffs served the writ upon the English company within the jurisdiction, and obtained an order giving them leave to issue and serve a concurrent writ on the Scottish company in Scotland under Order XI., r. 1 (*g*). The Scottish company applied to set the order aside upon the ground that they were not "proper parties" to the action, the cause of action against each company being different:—

Held, that under Order XVI., r. 4, the Scottish company could be joined as defendants in the action, and that therefore they were proper parties to the action within the meaning of Order XI., r. 1 (*g*), and the order was rightly made.

APPEAL from the refusal of Lord Coleridge J. at chambers to set aside an order giving the plaintiffs leave to issue a concurrent writ of summons and to serve it out of the jurisdiction.

The claim as indorsed on the writ was "for losses under policies of marine insurance upon the plaintiffs' goods and for damages for breaches of contracts to insure the plaintiffs' goods." This writ was served on the first defendants, the British Indemnity Insurance Company, within the jurisdiction, and an application was made ex parte for leave to issue a concurrent writ of summons against the second defendants, the Scottish Indemnity Company, Limited, and to serve it on them in Scotland under Order XI., r. 1 (*g*), as being necessary or proper parties to the action. The facts as stated in the affidavit in support of the application were that the plaintiffs were export merchants carrying on business in Vienna, and the defendants were two insurance companies registered in England and Scotland respectively. The defendants had a common office and secretary at 96, Queen Street, London, from which address all letters from the defendants to the plaintiffs' solicitors relative to the matter had been written. In such letters the said address was described as that of the "head office" of the Scottish Indemnity Company, the company registered in Scotland. The policies of insurance upon which the plaintiffs' claim was based were drawn up at Antwerp in the French language. The policies were signed in every case by a common agent on behalf of both the defendants, who were described therein as the British Indemnity Company, Limited, of London, and the Scottish Indemnity Company, Limited, of London, respectively, and who were each expressed to be interested to the extent of one half of the total amount insured under such policies. The affidavit further stated that the plaintiffs had suffered losses under the said policies, and the defendants had refused to carry out the contracts, and the plaintiffs submitted that the defendants the Scottish Indemnity Company, as co-insurers and co-contractors with the British Indemnity Insurance Company, were necessary and proper parties to the action, and that the plaintiffs should not be put to the expense and difficulty of bringing two actions, one in England and one in Scotland, and that having regard to the nature of the issues involved the English Commercial Court afforded a cheaper, more convenient, and more expeditious mode of trial for all parties than any concurrent procedure in Scotland.

There were about forty policies sued upon, all identical in form, each policy being on goods carried in a particular ship. The policy on the plaintiffs' goods per sailing vessel *Pamir* was taken as typical of all the policies. It stated that "the undersigned insure respectively the amounts or parts stated by each of them at the foot" of the policy "for the voyage from the interior to Antwerp by any means of transport and from there to Valparaiso per sailing vessel *Pamir*." The value of the goods was agreed at 1690 francs. At the foot of the policy in the right-hand column were the words "Insure in halves for the sum of 1690 francs—General agents, Segers & Geen" ("Assurent par moitié la somme de mille six cent nonante francs, Les agents généraux, Segers & Geen"), and on the left were stamped the names "The Scottish Indemnity Company Limited of London" and "The British Indemnity Insurance Company Limited of London"; and against the name of each company were the respective words "Francs 845, Scottish Indemnity," and "Francs 845, British Indemnity."

Bailhache J. made an order giving leave to issue the writ and to serve it on the Scottish Indemnity Company in Scotland. The Scottish Indemnity Company applied by summons that the order, the writ of summons, the service thereof, and all subsequent proceedings against them should be set aside upon the grounds that they were not necessary or proper parties to the action, and that the action was not properly brought against them, being in respect of separate causes of action against several defendants, and that there being a concurrent remedy in Scotland they ought not to be sued here having regard to Order XI., r. 2.

Lord Coleridge J. dismissed the application. The Scottish Indemnity Company by leave appealed.

P. B. Morle, for the appellants. Each policy contains two separate and distinct contracts, one by the British Indemnity Insurance Company and the other by the Scottish Indemnity Company, each company insuring the plaintiffs for one half of the total amount insured. The plaintiffs are not entitled to sue in one action two defendants whose liabilities are several depending on separate contracts. The Scottish Indemnity Company is therefore not a necessary or proper party to the action against the British Indemnity Insurance

Company. The two defendants are separate underwriters of one policy for separate amounts, like the underwriters of a Lloyd's policy, and each subscription is a distinct contract on which each underwriter is separately liable: 2 Arnould on Marine Insurance, 2nd ed., p. 1249; and this is still the law: Marine Insurance Act, 1906 (6 Edw. 7, c. 41), s. 24, sub-s. 2; 2 Arnould on Marine Insurance, 8th ed., p. 1538. In practice the leading underwriter is sued, and the rest agree to abide by the result. The plaintiffs cannot join these two distinct causes of action in one action. Order XVI., r. 1, allowing plaintiffs to be joined in one action, is wider in its scope than r. 4, which allows joinder of defendants. Rule 4 applies where the right to relief arises out of one contract. Here there are two contracts. If the plaintiffs recover judgment in the action, they will get separate judgments against each of the defendants. It is a mere accident that each of the defendants underwrote the policies for the same amounts. After the decision in *Smurthwaite* v. *Hannay* (1) Order XVI., r. 1, as to joinder of plaintiffs was altered so as to make its application wider, but r. 4 was left unaltered, as well as Order XVIII., which deals with joinder of causes of action. Order XVI., r. 4, only applies where each defendant is liable for the whole amount of the claim "whether jointly, severally, or in the alternative." The Scottish Indemnity Company are therefore not proper parties to the action.

Harold Murphy, for the plaintiffs. Since the alteration made in 1896 in Order XVI., r. 1, consequent upon the decision of the House of Lords in *Smurthwaite* v. *Hannay* (1), that Order deals with joinder of causes of action as well as with joinder of parties, and r. 4 of the Order must be construed in that light: *Compañia Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co.* (2); *Times Cold Storage Co.* v. *Lowther.* (3) Therefore where, as here, the subject-matter of complaint as against the two defendants is the same, arising out of the same transaction, though the cause of action against each of them is technically different, the defendants can be joined in one action under r. 4, subject to the power of the Court under r. 5 in any particular case to make an order to prevent embarrassment. In *Steamship Thanemore* v. *Thompson* (1) the plaintiff brought an action against several underwriters on a policy of marine insurance and, having served some of them within the jurisdiction, was given leave ex parte to serve some of them in Scotland under Order XI., r. 1 (*g*); and in *The Elton* (2), which was an action in personam for salvage services rendered to ship, freight, and cargo, the plaintiffs served the writ on the owners of the ship within the jurisdiction and were given leave to serve notice of the writ on the cargo owners out of the jurisdiction. The defendants are severally liable for an amount equal to one half of the total sum insured under each policy, and there is no clause in the policies making each of the defendants, liable only for a proportion of the loss. The plaintiffs therefore could claim against one of the defendant companies the amount of the loss, if such loss did not exceed one half of the total sum insured, leaving such company to enforce any right of contribution they might have against the other defendant company. The facts here are such as to shew that the defendants are properly joined within r. 4. It is a matter of discretion upon all the facts. "When the liability of several persons depends upon one investigation, I think they are all 'proper parties' to the same action, and, if one of them is a foreigner residing out of the jurisdiction, r. 1 (*g*) of Order XI. applies": per Lindley L.J. in *Massey* v. *Heynes*. (3) The order therefore allowing the concurrent writ to be issued and served on the Scottish Indemnity Company in Scotland was rightly made.

---

(1) [1894] A. C. 494.
(2) [1910] 2 K. B. 354.
(3) [1911] 2 K. B. 100, at p. 107.

P. B. Morle in reply. No question of contribution between the defendants can arise, because by s. 67, sub-s. 2, of the Marine Insurance Act, 1906, each insurer is only liable for such proportion of the loss as the amount of his subscription bears to the total sum insured. In most of the cases cited there could not have been more than one judgment against all the defendants. In *Massey* v. *Heynes* (3) and *Compañia Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co.* (4) the claims against the defendants were in the alternative. *Times Cold Storage Co.* v.

---

(1) (1885) 52 L. T. 552.

(2 [1891] P. 265.

(3) (1888) 21 Q. B. D. 330, at p. 338.

(4) [1910] 2 K. B. 354.

Lowther (1) dealt with adding a defendant to a counter-claim, and the observations of Bankes J. (at p. 107) as to Order XVI., rr. 1, 4, are obiter and not well founded. In *Steamship Thanemore* v. *Thompson* (2) the decision was on an ex parte application, and the facts are not fully stated in the report, but if it decided that all the underwriters for separate amounts on a policy could be joined in one action, the decision is wrong.

[SWINFEN EADY L.J. referred to *Frankenburg* v. *Great Horseless Carriage Co.* (3)]

KENNEDY L.J. I have come to the conclusion that this appeal should be dismissed. It is an appeal from the refusal of Lord Coleridge J. to rescind an order of Bailhache J. giving the plaintiffs leave to issue the writ of summons and to serve it on the defendants, the Scottish Indemnity Company, in Scotland.

In dealing with the authorities as to the application of Order XVI., r. 4, it is necessary to bear in mind the alteration which was made in 1896 in r. 1, and the effect which the alteration had upon all the rules of Order XVI., including r. 4. Rule 4 permits the joinder in one action of several defendants, and is couched in wide terms. It provides that "all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment." The application of the rule is, no doubt, subject to the discretion of the Court as to whether in any particular case it is proper to allow the joinder. It has been judicially said that the effect of the alteration in r. 1 is that Order XVI. does not now deal solely with joinder of parties but deals also with joinder of causes of action, and that r. 4 must be read as part of the code of rules contained in Order XVI., which purports to deal to some extent with joinder of causes of action. The effect therefore is to extend the application of r. 4 to joinder of causes of action as well as of defendants.

---

(1) [1911] 2 K. B. 100.

(2) 52 L. T. 552.

(3) [1900] 1 Q. B. 504.

The question in this case is whether the Scottish Indemnity Company ought to be allowed to be joined as defendants in an action properly brought against the British Indemnity Insurance Company in England. The latter were properly served with the writ here, and the plaintiffs applied for leave under Order XI., r. 1 (*g*), to issue a concurrent writ and serve it on the Scottish company in Scotland, and thus to make them defendants in the action. The propriety of allowing the Scottish company to be added as defendants depends upon whether the case comes within Order XI., r. 1 (*g*), which provides for service out of the jurisdiction "whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." The action is brought by persons who had entered into a written contract which is described in the original French as "Arrêté d'assurance maritime." This document has been treated as a policy of marine insurance. The contract is signed by persons named Segers and Geen, who described themselves as "les agents généraux," and who professed to have authority to make the contract on behalf of both the defendant companies. What the exact effect of that contract is may be open to question. The undersigned are stated in it to insure respectively the amounts or parts stated by each of them at the foot thereof. Taking the case of the *Pamir* as a sample of all, the total sum insured is 1690 francs, and 845 francs, one half of the total amount, is written against the name of each company. One view of the contract which might be taken is that each of the defendants might be sued separately upon the contract for 845 francs. Another view which might be taken is that the defendants are joint parties to a contract of insurance for 1690 francs, under which inter se each is liable for one half. In either view I think that the appeal fails. The plaintiffs say that they have suffered loss of their goods covered by the contract of insurance, and that the defendants have agreed to indemnify them against that loss. They claim to recover in respect of that loss against both the defendants, whether that claim be for 1690 francs against both defendants or for 845 francs against each of the defendants. Whatever the exact claim is, it is based upon a contract contained in one document and the facts necessary to be proved in order to enforce the claim against each of the defendants are the same. The right to relief claimed arises out of the same transaction, namely, the shipment of goods in a named ship and a loss in respect of those goods on board the ship from causes against which the defendants have insured the plaintiffs, and the liability of each of the defendants will have to be proved in exactly the same way. It is therefore said that the Scottish company are proper parties to be joined in the one action, and that the case comes within Order XVI., r. 4, and within the language of Lindley L.J. in *Massey* v. *Heynes*(1), where he says: "When the liability of several persons depends upon one investigation, I think they are all 'proper parties' to the same action, and, if one of them is a foreigner residing out of the jurisdiction r. 1 (*g*) of Order XI. applies."

It has been pointed out that, though the Scottish company is resident in the legal sense in Scotland, they describe themselves in the policies of insurance as "of London." That is relevant upon the question of the exercise of discretion. In my opinion there was jurisdiction under Order XVI., r. 4, to join these defendants in one action, and the discretion should be exercised in favour of the plaintiffs. There is no suggestion that it will cost more to try the action against the Scottish company here than in Scotland, which is a matter we are required by Order XI., r. 2, to take into consideration before giving leave to serve the writ in Scotland. The case therefore stands on the same footing as if the Scottish company were a foreign company. The language of Lindley L.J. in *Massey* v. *Heynes* (1) and of Fletcher Moulton L.J., in *Compañia Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co.* (2) applies to this case, and the refusal of the learned judge to set aside the order for leave to issue the writ and to serve it in Scotland was right. As to the case of *Steamship Thanemore* v. *Thompson* (3) I should be reluctant to base my judgment upon it, because, though it may have been quite rightly decided, it was a decision upon an ex parte application where no counsel was heard on the other side. In my judgment Order XVI., r. 4, must now be construed liberally, and this case comes within its provisions, and therefore the Scottish company are "proper parties" to the action properly brought in this country against the English company within Order XI., r. 1 (*g*).

---

(1) 21 Q. B. D. 330, at p. 338.

(2) [1910] 2 K. B. at pp. 364, 365.

(3) 52 L. T. 552.

Swinfen Eady L.J. I am of the same opinion. We have not to consider whether the Scottish company could have been sued here separately upon these policies of insurance. The question we have to consider is whether they are properly joined as defendants in this action. The defendants are two insurance companies, one being registered in England and the other in Scotland. They have a common office and a common secretary in London, and in all letters written by the defendants to the plaintiffs' solicitors the London office is described as the "head office" of, as I understand, both the companies. The policies sued upon are in the French language, and they were drawn up and signed at Antwerp. They were all signed by a common agent purporting to act on behalf of both companies, and both the companies were described therein as "of London." The companies are stated in the policies to be interested respectively to the extent of one half of the total amount insured thereunder. The facts connected with the case of each company both as regards the contract of insurance and the alleged breaches are identical, and I have not heard anything said of one company which is not equally applicable to the other. There is, as I have said, one signature by a common agent for both companies, each company insuring in equal moieties the total sum insured, and the name of each company being placed opposite to a figure which represents that moiety. Therefore this is pre-eminently a case in which the claims and the circumstances in respect of each of the defendants may be considered as identical.

It is said that the defendants could not, before the alteration in 1896 in Order XVI., r. 1, have been joined in the same action under Order XVI., r. 4, and that the alteration which was made in 1896 in r. 1 has not the effect of allowing the defendants to be joined under r. 4, as it only applies to r. 1. In my opinion the alteration in r. 1 has made a considerable change in the practice.

Before the alteration Order XVI. dealt merely with the joinder of parties in respect of the same cause of action, and not with the joinder of separate causes of action. *Smurthwaite* v. *Hannay* (1) is clear upon that. Since the alteration it can no longer be said that Order XVI. relates only to joinder of parties and not to joinder of causes of action. With regard to the contention that the alteration is only in r. 1 and not in r. 4, I may first cite what Lord Herschell said in *Smurthwaite* v. *Hannay* (1) at p. 500: "Order XVI., r. 1, purports to deal merely with the parties to an action, and has, I think, no reference to the joinder of several causes of action." And at p. 501 he says: "It cannot be doubted that whatever construction is put upon the rule I have been considering must be applied equally to r. 4 of the same Order." So that in his view the rules of Order XVI. are a code dealing with the joinder of parties, and whatever construction is placed upon r. 1 ought to be applied also to r. 4. It follows that if a different construction is now placed upon r. 1, a similar construction must now be placed upon r. 4. That seems to me to be the meaning of the passage in the judgment of Fletcher Moulton L.J. in *Compañia Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co.* (2): "The terms of this rule"—the Lord Justice was referring to r. 1 as altered—"to my mind make it clear that Order XVI. does not now deal solely with joinder of parties, but also deals with joinder of causes of action." In connection with that there is the wide language of r. 4, which provides that "all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative"; and r. 5 gives the Court power to prevent any injustice, because the latter part of the rule says that "the Court or a judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest." It is difficult to see how the concluding words of that rule can apply to any part of the proceedings in the present case, that is to say, it is difficult to see how the Scottish company can have no interest in any part of the proceedings. It was pointed out by Buckley L.J.

---

(1) [1894] A. C. 494.

(2) [1910] 2 K. B. 354, at p. 365.

C. A.
1914

OESTERREICHISCHE EXPORT A. G
v.
BRITISH INDEMNITY INSURANCE COMPANY, LIMITED.

Swinfen Eady L.J.

in the same case (1) that "it is the same cause of action as against both defendants, if by that is meant that all the material facts which go to shew injury to the plaintiffs' goods, by reason of the unseaworthiness of the ship, are common to the case as against both the defendant companies. The difference as between the two defendant companies lies, as in *Frankenburg* v. *Great Horseless Carriage Co.* (2), in the fact that one of the defendant companies may be liable on one ground, and the other may be liable on another ground, and therefore the respective liabilities of the two companies do not rest upon a common ground." This latter observation does not apply to the present case, because the respective liabilities of the two companies do rest upon a common ground. In my opinion the case falls within and is covered by the wide language of r. 4, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Stephenson, Harwood & Co.*

Solicitors for defendants the Scottish Indemnity Company: *Wickes & Knight.*

(1) [1910] 2 K. B. at p. 369.

(2) [1900] 1 Q. B. 504.

W. F. B.

1914
March 9.

In re A DEBTOR (No. 1 OF 1914).

Ex parte THE DEBTOR *v.* THE PETITIONING CREDITOR.

Solicitor and Client—Retainer to conduct Action—Authority to compromise after Judgment—Assent to Assignment by Defendant for Benefit of Creditors.

A retainer to a solicitor to conduct an action does not include an authority to compromise it after judgment by assenting to the execution by the defendant of a deed of assignment of his property to a trustee for the benefit of his creditors.

APPEAL from the county court of Oldham.

In July, 1913, the husband of the respondent, Mrs. Sharples, was knocked down by a taxicab belonging to the appellant and killed. The respondent retained a solicitor named Challinor to take proceedings against the appellant in the following form:— "Please take the necessary proceedings on my children's and my own behalf to recover compensation for the loss of my husband through the negligence of Mr. S—— through one of his employees.—Mabel Sharples." Challinor brought the action on her behalf and she recovered judgment for 850*l.* Execution was issued, and the sheriff's officer was met by a deed of assignment by the appellant to a trustee for the benefit of his creditors. A clerk of Challinor's named Christian attended the meeting of creditors on Mrs. Sharples' behalf, but without any instructions from her to do so. She had no knowledge of such a deed having been executed by the appellant. Christian voted against the appointment of the trustee proposed by the debtor, and procured the appointment of a nominee of his own as trustee. A form of assent to the deed of assignment was then sent to Mrs. Sharples, but she refused to sign it and repudiated her solicitor's authority to assent to it on her behalf. Mrs. Sharples instructed fresh solicitors, Messrs. Sharratt & Saxon, to present a bankruptcy petition against the debtor, alleging the deed of assignment as the act of bankruptcy. The registrar held that the retainer of Mr. Challinor was a retainer simply to act in the course of the action, and did not entitle him to represent Mrs. Sharples at the meeting or to acquiesce in the deed. He accordingly made the receiving order asked for. The debtor appealed.

Dehn, for the appellant. The respondent's solicitor had authority to assent to the deed of assignment. That the solicitor on the record has his client's implied authority to compromise the action before judgment is well settled: *Prestwich* v. *Poley* (1); *In re Newen.* (2) Even after judgment the solicitor on the record has authority to compromise and accept a less sum than that for which judgment was obtained, and he has power to bind his client by the compromise even though in making it he acted in direct defiance of the client's instructions, provided the limitation of his authority was not communicated to the other side: *Butler* v. *Knight.* (3) If that is the rule where the retainer is to conduct an action, a fortiori must the solicitor have such authority where the retainer is to "take the necessary proceedings to recover compensation." "Proceedings" is a wider term than action, and would include the steps necessary to enforce payment of the judgment. Even if the solicitor here had not the client's authority to assent to the deed of assignment so as to bar her from instituting bankruptcy proceedings, he had at all events sufficient authority to act in such a way in reference to the deed of assignment as to preclude her from relying on that particular deed as an act of bankruptcy.

Ridgway Bennett, for the respondent. The general rule is that the authority contained in a solicitor's retainer ends with judgment. When once that has been signed the authority to compromise is gone. In *Lovegrove* v. *White* (4) it was held that an attorney retained for the conduct of an action had no implied authority after judgment in favour of the client to enter into an agreement on his behalf to postpone execution in consideration of the defendant paying a portion of the judgment debt at an earlier date than he was required to pay it by the terms of the judgment. In *James* v. *Ricknell* (5) a solicitor who had recovered judgment for a client under an ordinary retainer was held to have no authority, without special instructions, to engage in proceedings in interpleader. If there is no such authority in that case although interpleader proceedings may be necessary to reap the fruits of the judgment, neither can there be any authority to assent to a deed of assignment. The case of *Butler* v. *Knight* (1) turned upon the fact that the client had continued the employment of the solicitor after judgment. It was conceded that the original retainer was exhausted by the judgment, but the Court pointed out that the client had extended the retainer by giving directions to the attorney as to the payment of the sum awarded by the verdict. There are no such facts in the present case to extend the retainer after judgment. But even if a solicitor can by virtue of his retainer have implied authority to enter into a compromise after judgment as between his client and the other party to the action, he can have no such authority to bind her by a compromise as between herself and the defendant's other creditors.

---

(1) (1865) 18 C. B. (N.S.) 806.

(2) [1903] 1 Ch. 812.

(3) (1867) L. R. 2 Ex. 109.

(4) (1871) L. R. 6 C. P. 440.

(5) (1887) 20 Q. B. D. 164.

Dehn in reply.

HORRIDGE J. This is an appeal from the registrar of the county court of Oldham, who granted a receiving order against the debtor. The act of bankruptcy relied on was that the debtor had executed a deed of assignment of his property to a trustee for the benefit of his creditors. The act of bankruptcy was not denied, but it was said that the petitioning creditor had through her solicitor acted in such a way as to preclude her from taking advantage of the deed as an act of bankruptcy. The registrar believed the evidence of Mrs. Sharples and found as a fact that she had not authorized her solicitor to assent to the deed either before or after its execution. But it was contended on the debtor's behalf that the retainer of the solicitor in this case entitled him, even after judgment, to compromise the action, and therefore entitled him to enter into an agreement with the other creditors in the nature of a compromise and to affect his client's position to the extent of preventing her being entitled to rely on the deed in question as an act of bankruptcy. I do not think it necessary to decide in this case whether a solicitor

(1) L. R. 2 Ex. 109

has by virtue of his retainer authority to compromise an action after judgment as between the parties to it. In my view such authority would not extend even during the pendency of the action to an agreement with the defendant's other creditors, and still less would it extend to an agreement with them after judgment. The solicitor's authority to compromise is in my opinion limited to a compromise between the plaintiff and the defendant. What was done here was to enter into an agreement not merely between the plaintiff and the defendant, but with the other creditors also. The effect of a creditor's assent to such a deed would be to make its execution operate as an act of bankruptcy, and to put other creditors who had not assented to it in the position of being able to take bankruptcy proceedings against the estate, and moreover would operate to prevent the assenting creditor from taking such proceedings herself. It was not disputed by Mr. Dehn that the original retainer would not authorize the solicitor to institute bankruptcy proceedings against the defendant, and equally I think it could not authorize him either to enter into an agreement which would prevent his client from taking bankruptcy proceedings at all, or to act in such a manner in connection with a deed of assignment by the debtor as to prevent his client from relying upon that deed as an act of bankruptcy. In my opinion there is no rule of law which compels us to hold that the solicitor in this case had any implied authority after judgment so to act as to preclude Mrs. Sharples from presenting this petition.

Atkin J. I agree. It does not seem to me to be necessary to determine whether after judgment a solicitor has implied authority to compromise the judgment which he has obtained for his client. I think that, if he has such authority, it would not extend to such a compromise as entering into a deed of arrangement which involves entering into relations not merely with the debtor but with the trustee and the other creditors of the debtor, persons who are strangers to the action in which the judgment was obtained. The appellant's contention further involves—and this is a matter of some consequence—that the solicitor would be deemed to have authority to consent to the debtor's committing an act of bankruptcy, which might alter his status against the client's wishes if some other creditor chose to treat it as an act of bankruptcy. I cannot think that the solicitor's power to compromise includes a right to assent to a document involving consequences such as those. I think, therefore, that the petitioning creditor here was not bound by the act of her solicitor, and that the registrar was right in making the receiving order.

Appeal dismissed.

Solicitors for appellant: *Bailey, Redman & Co., Manchester.*

Solicitors for respondent: *Maw, Redman & Co., for Sharratt & Saxon, Manchester.*

J. F. C.

1914
March 23.

BAKER *v.* ELLISON.

Corporation—By-law—Wilful Obstruction of Corporation's Servants in Execution of their Duty—Regulation prohibiting Passengers riding on Top of Motor Omnibuses on Part of Route—Refusal of Passenger to descend from Top—Delay of Omnibus.

The E. Corporation, who had statutory authority to run motor omnibuses, made a regulation prohibiting on one section of a particular route passengers riding on the top of the omnibuses. The regulation was made for the safety of passengers in view of the camber of the road, and notice thereof was exhibited on the top of the omnibuses, but attention was not drawn thereto on passengers' tickets. The appellant, who had previous knowledge of the regulation, was an outside passenger on an omnibus on the particular route and had paid the fare entitling him to travel over the section to which the regulation applied. When the omnibus reached the beginning of that section he refused to come down from the top although his attention was again called to the notice on the omnibus by the conductor and an inspector, the appellant stating that he had got his ticket and intended riding on the top to the terminus. The inspector declined to allow the omnibus to proceed while the appellant remained on the top, and it was thereby delayed twenty minutes. The appellant having been convicted of a breach of the corporation's by-law which provided that "No passenger or other person shall wilfully obstruct or impede any officer or servant of the council in the execution of his duty upon or in connection with any motor omnibus":—

Held, that the appellant was not entitled to be carried on the top of the omnibus on the part of the route to which the regulation applied inasmuch as the corporation had not, in respect of that part of the route, held themselves out as common carriers of passengers on the top of their omnibuses, or contracted to carry the appellant on the top of the omnibus; that the appellant's conduct amounted to wilful obstruction of the conductor and inspector within the meaning of the by-law; and, therefore, that the conviction was right.

Case stated by justices of Eastbourne.

The appellant, Baker, was charged with having unlawfully and wilfully obstructed and impeded John Wise and William Cottington, servants of the Eastbourne Corporation, in the execution of their duty upon or in connection with a motor omnibus.

At the hearing before the justices the following facts were proved or admitted:—

By-laws for regulating the travelling in or upon any motor omnibus belonging to the Eastbourne Corporation had been duly made. No. 15 of those by-laws was as follows: "No passenger or other person shall wilfully obstruct or impede any officer or servant of the council in the execution of his duty upon or in connection with any motor omnibus."

On August 27, 1913, the appellant was a passenger on a motor omnibus belonging to the Eastbourne Corporation and proceeding from the railway station to the Old Town at Eastbourne. He paid the fare of one penny, which was the proper fare either to the Tally Ho, the terminus of the particular route, or to the Lamb Inn, an intermediate stopping place. In view of the camber of the road between the Lamb Inn and the Tally Ho, the corporation had, for the safety of passengers, made an order prohibiting passengers riding on the top of the motor omnibuses between the Lamb Inn and the Tally Ho. That order was made in September, 1906, since which date notice thereof had been published and exhibited in a conspicuous position on the top of the motor omnibuses running to Old Town. A copy of the notice was exhibited on the top of the motor omnibus on which the appellant travelled on the day in question. The notice was in the following terms:—

"Notice.

"Old Town Route.

"Passengers are allowed to ride *on top* of the motor omnibuses between the railway station and the Lamb Inn only, but (for the safety of the passengers) *not between the Lamb Inn and the Tally Ho.*

"Tickets are issued to passengers subject to their observance of this condition, which will be strictly enforced.

"By order."

No attention was called to this regulation by anything printed on passengers' tickets. The appellant had previous knowledge of the existence of the order and notice.

When the omnibus arrived at the Lamb Inn the appellant was told by Cottington, the conductor, that he was not allowed to ride on the top between the Lamb Inn and the Tally Ho, whereupon the appellant stated that he had got his ticket and intended to ride on the top to the Tally Ho, and that if he was breaking any rules by doing so Cottington could have his name and address when they got to the Tally Ho. Cottington requested the appellant to stand up inside the omnibus, but the appellant refused to leave the top, although his attention was again called to the notice. Subsequently Wise, the corporation's omnibus inspector, appeared on the scene and called the appellant's attention to the notice, and said that in face of that notice he could not allow the omnibus to proceed if he, the appellant, insisted upon remaining on the top. The appellant eventually descended and left the omnibus altogether. During the discussion with him the omnibus remained stationary at the Lamb Inn, and, not being allowed to proceed while he remained on the top, was delayed about twenty minutes.

There was no by-law prohibiting passengers from riding on the top between the Lamb Inn and the Tally Ho.

It was customary for passengers who might be on the top of the omnibus on arrival at the Lamb Inn to be requested by the conductor to come down, and such passengers had on some other occasions been permitted to stand up inside the omnibus if there was not seating accommodation, but, if there was not standing room inside, the passengers had to leave the omnibus notwithstanding they had paid their fare for the whole journey to the Tally Ho.

Cottington and Wise were at the material time officers or servants of the corporation within the meaning of the by-law and were then in the execution of their duty upon or in connection with the motor omnibus by which the appellant travelled.

It was contended on behalf of the appellant that the corporation were common carriers of passengers and had no right to limit their obligations as such; that the regulation, i.e., the notice in question, was unenforceable, not being a by-law, and that, even assuming that it was enforceable, the appellant's conduct only amounted to a breach of contract; that the appellant's conduct was not the direct cause of the delay of the omnibus; that the evidence did not disclose any active interference or threats and/or mens rea, and therefore the offence of unlawful and wilful obstruction was not proved; that there being standing room only inside the omnibus it was not open to the appellant to change his place from the top to the interior because, had he done so, he would have committed a breach of by-law No. 10, which prohibited any passenger travelling on the steps of a motor omnibus or standing either on or in the same; and that on occasions passengers who had paid their fare for the entire journey to the Tally Ho and who had to leave the omnibus at the Lamb Inn by reason of the want of accommodation inside the omnibus were not permitted to complete the journey on another omnibus without paying another fare of one penny.

On behalf of the respondent it was contended that under the Eastbourne Corporation Act, 1902, s. 14, sub-s. 1, it was permissible only and not compulsory for the corporation to provide and run motor omnibuses, and that they could not be compelled to provide outside accommodation for passengers over any road which in their opinion might be dangerous; that the regulation was reasonable and necessary for the safety of passengers; that the appellant had had due and proper notice of the regulation, was bound by it, and had paid his fare and accepted his ticket subject thereto; that by refusing to quit the top of the omnibus at the Lamb Inn the appellant had failed to observe the conditions subject to which he was a passenger on the omnibus; that such refusal constituted an infringement of by-law No. 15; and that there was no breach of contract by the appellant in respect of which the corporation could have brought a civil action against him, but that if he considered there was a breach of contract by the corporation he had his remedy by bringing a civil action against them.

The justices were of opinion that the regulation was reasonable and in the best interests of the safety of the public; that the appellant knew of the regulation before he purchased his ticket and travelled by the omnibus; that the appellant's conduct in refusing to descend from the top of the omnibus constituted the cause of the delay of the omnibus and also the offence of wilful obstruction within the meaning of the by-law; that on the occasion in question a vacant seat in front of the omnibus was available for the appellant; and that it was part of the duty of Cottington and Wise to see that the regulation was enforced and to see that the omnibus was run as nearly as possible to its scheduled time, and that the appellant obstructed and impeded them in carrying out these duties. The justices accordingly convicted the appellant, but stated this case for the opinion of the Court as to whether they were right in so doing.

Macmorran, K.C. (*Merlin* with him), for the appellant. The justices were wrong in convicting the appellant. The Corporation of Eastbourne as omnibus proprietors were common carriers of passengers—*Clarke* v. *West Ham Corporation* (1)—and were bound, as such, to carry the appellant, on payment by him of the regulation fare, for the whole of the distance the omnibus was advertised to run, namely, to the Tally Ho, provided there was room on or in the omnibus, and on the occasion in question there was room. It is an unreasonable condition to attach to the contract of carriage that if a passenger goes on to the top he is liable to be asked to come down at a particular stage of the journey and to stand inside in breach of the corporation's by-law No. 10, or to get off and walk. A condition exhibited as this was only becomes known to passengers when they get on to the top of the omnibus, and, not being notified to a passenger when he enters the omnibus, cannot be imposed. It is unreasonable in itself and the corporation are attempting to give it the effect of a by-law. Even if the condition is held to

(1) [1909] 2 K. B. 858.

be lawful, the appellant was not guilty of wilful obstruction. The obstruction of an officer means the doing of something to him which prevents him carrying out his duties. No case can be found charging a person with obstruction who, as in the present case, was merely insisting upon what he believed to be his legal rights during a discussion. Mens rea must be shewn; obstruction must be the primary object; and the mere delaying of the omnibus while the discussion was going on was not due to any intention on the part of the appellant to obstruct the officers. In *M'Clean* v. *Great Southern and Western Ry. Co.* (1) Palles C.B., in dealing with the case of a railway passenger who had persistently refused to produce his ticket, said: "My own view is that the mere refusal to show a ticket on demand, although that refusal may be a persistent refusal, is not per se impeding an officer in the discharge of his duty within s. 16 of the [Railway Regulation] Act of 1840."

[Avory J. In that case the passenger was not insisting on remaining in a position which rendered it physically impossible for the train to proceed. In this case, if the omnibus had proceeded with the appellant on the top, it is possible that it might have overturned and injured not merely the appellant but also the passengers inside.]

There was no intention on the part of the appellant to obstruct the officers, and such an intention is necessary to constitute the offence of wilful obstruction. [*Bastable* v. *Little* (2) and *Betts* v. *Stevens* (3) were referred to.]

R. M. Montgomery, for the respondent, was not called upon.

Bray J. In this case the appellant was convicted of a breach of a by-law which is in these words: "No passenger or other person shall wilfully obstruct or impede any officer or servant of the council in the execution of his duty upon or in connection with any motor omnibus." Two points have been raised. It is said first that the appellant was entitled to be carried on the top of the omnibus from the Lamb Inn to the Tally Ho, and that being lawfully on the top of the omnibus he was entitled to require the corporation to perform their obligation of carrying him. That contention is based upon two grounds, first, that the corporation were common carriers of passengers, and, secondly, that, if they were not, there was a special contract to carry. On the first of those two points, the case of *Clarke* v. *West Ham Corporation* (1) was cited, where it was held that the corporation were common carriers because they held themselves out to be such. In this case what did the Eastbourne Corporation hold themselves out to be? That depends upon the notice that was exhibited. It is found as a fact that there was exhibited in a conspicuous position on the top of all motor omnibuses running on this route a notice in these terms: "Old Town Route. Passengers are allowed to ride *on top* of the motor omnibuses between the railway station and the Lamb Inn only, but (for the safety of the passengers) *not between the Lamb Inn and the Tally Ho.* Tickets are issued to passengers subject to their observance of this condition, which will be strictly enforced." Further facts are stated which shew that as a matter of fact the corporation carry out that regulation, that it is customary for passengers on arrival at the Lamb Inn to be requested to come down, and some passengers are permitted to stand up inside the omnibus if there is not sitting accommodation, but that, if there is not standing room inside, the passengers have to leave the omnibus notwithstanding that they have paid their fare for the whole journey to the Tally Ho. It seems to me that the justices would be perfectly entitled to come to the conclusion that the corporation were not common carriers of passengers on the top of the omnibuses between the Lamb Inn and the Tally Ho. If so, the plaintiff was not by virtue of that entitled to travel on the top. Considering next the question of contract, it is found that the appellant knew of the notice on the omnibuses, as his attention, prior to the day in question, had been called to it and he had previously objected to its validity. If then he chose with knowledge of that notice to apply for and pay for a ticket there was no contract by the corporation to carry him on the top of the omnibus between the Lamb Inn and the Tally Ho. The first point therefore fails on both grounds.

---

(1) (1908) 42 I. L. T. 239.

(2) [1907] 1 K. B. 59.

(3) [1910] 1 K. B. 1.

(1) [1909] 2 K. B. 858.

The next question is whether the appellant's conduct amounted to a wilful obstruction or impeding of any officer or servant of the council in the execution of his duty upon or in connection with any motor omnibus. The appellant travelled on the top of the omnibus as far as the Lamb Inn, and when he arrived there the conductor asked him to descend and get inside, but he refused to do so. An inspector then came upon the scene, and he also called the appellant's attention to the notice, and said that in face of it he could not allow the omnibus to proceed if he, the appellant, insisted upon remaining on the top. During this discussion the omnibus not being allowed to proceed was delayed about twenty minutes. Was that in consequence of the appellant's conduct? The justices have found that the conduct of the appellant in refusing to descend constituted the cause of the delay of the omnibus and also the offence of wilful obstruction within the meaning of the by-law. There was evidence entitling them to find that the conduct of the appellant in refusing to descend caused the delay of the omnibus, and the reason is obvious, because, in view of the camber of the road, the omnibus would be at an angle, and if there was any considerable weight on the top it might be thrown over and not only the persons on the top but likewise those inside endangered. There is ample evidence that he was the cause of the delay. Then was his conduct wilful obstruction within the meaning of the by-law? In my opinion it was. As to its being wilful, he had knowledge of the notice and insisted upon remaining on the top knowing what the consequence would be. As to its being obstruction, his conduct prevented the officers doing their duty, namely, ordering the omnibus to go on. There being in my opinion evidence of wilful obstruction within the meaning of the by-law, the appeal must be dismissed.

Avory and Rowlatt JJ. concurred.

Appeal dismissed.

Solicitors for appellant: *Billing & Co., for W. T. James, Eastbourne.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for H. W. Fovargue, Eastbourne.*

J. S. H.

C. A.
1914
March 3, 4.

Distinguished.
READ *v.* ASTORIA GARAGE LD.
[1952] 1 Ch. 637

[IN THE COURT OF APPEAL.]

NELSON *v.* JAMES NELSON & SONS, LIMITED.

[1912 N. 1075.]

Company—Articles of Association—Board of Directors—Powers—Appointment of Managing Director—Power to revoke Appointment.

The articles of association of the defendant company provided that the board of directors might appoint one of their number to be managing director for such period as they deemed fit, and might revoke the appointment. The board appointed the plaintiff to be managing director upon the terms of an agreement which provided that he should hold the office so long as he should remain a director of the company and retain his due qualification and efficiently perform the duties of the office. Subsequently, while the plaintiff was still fulfilling the conditions of the agreement, the board revoked the appointment. The plaintiff sued the company for damages for breach of agreement:—

Held, that the articles of association did not empower the board to revoke the appointment at will, or otherwise than in accordance with the terms of the agreement under which the plaintiff was appointed managing director, and that the plaintiff was entitled to recover damages against the company.

Judgment of Scrutton J. [1913] 2 K. B. 471 affirmed.

APPEAL from the judgment of Scrutton J. after the trial of the action with a special jury; reported [1913] 2 K. B. 471.

The defendant company carried on business as importers of and dealers in meat, cattle, and sheep in the British Isles and South America. In 1904 the plaintiff, Thomas Cormac Nelson, who was a director of and a shareholder in the company, was appointed joint managing director of the company with his brother Edward Nelson. On January 16, 1908, an agreement in writing was entered into between the plaintiff and the company, acting by the directors, which provided that the plaintiff should continue to act as joint managing director at a salary of 3000*l.* a year. Clause 2 of the agreement was as follows: "The said Thomas Cormac Nelson shall hold the said office so long as he shall remain a director of the company and retain his due qualification and shall efficiently perform the duties of the said office."

By clause 3 the plaintiff as such managing director should well and faithfully serve the company and devote the whole of his time and attention to its business and affairs.

By clause 5 the plaintiff "shall be at liberty to resign the said office at any time on giving six calendar months' written notice of his desire to do so."

By clause 6 if the tenure of office by the plaintiff should be determined in consequence of the company being wound up he should not be entitled to claim damages against the company for his loss of office.

By clause 7 the plaintiff was not so long as he was managing director to carry on or be engaged in the business of importers of or dealers in cattle and meat, but he might supervise the firms in which he was then interested.

On September 10, 1912, the directors of the company passed a resolution "that the appointments of Mr. Edward Nelson and Mr. Thomas Cormac Nelson as managing directors be and the same are hereby revoked," and that Mr. Edward Nelson be appointed managing director. At that date the plaintiff was a director of the company and retained his due qualification, and it was not suggested that he had not efficiently performed the duties of his office.

The plaintiff alleged that the revocation of his appointment constituted a breach of the agreement of January 16, 1908, for which he claimed damages in this action.

The defendant company by their defence pleaded (1.) that by article 85 (B.) of the articles of association of the company the directors of the company had power to revoke the plaintiff's appointment; (2.) that the directors had no power or authority to appoint the plaintiff to be joint managing director of the company or to enter into the agreement of January 16, 1908, except upon the terms of and in accordance with the articles of association, including article 85 (B.), under which the appointment was expressly subject to revocation.

The company's articles of association, so far as is material to this report, were as follows:—

82. "The qualification of a director shall be the holding of shares of the company of the nominal amount of 500*l*. . . . ."

84. "The business of the company shall be managed by the board, who may pay all expenses of or incident to the formation, registration and advertising of the company, and the issue of its capital, including brokerage and commissions for obtaining applications for or placing shares. The board may exercise all the powers of the company, subject, nevertheless, to the provisions of any Acts of Parliament or of these articles, and to such regulations (being not inconsistent with any such provisions or these articles) as may be prescribed by the company in general meeting, but no regulations made by the company in general meeting shall invalidate any prior act of the board which would have been valid if such regulations had not been made."

85. "Without restricting the generality of the foregoing powers, the board may do the following things:—

"(A.) Establish local boards, local managing committees, or local agencies in the United Kingdom or abroad, and appoint any persons to be members thereof, with such powers and authorities, under such regulations, for such period, and at such remuneration as they may deem fit, and may from time to time revoke any such appointment:

"(B.) Appoint from time to time any one or more of their number to be managing director or managing directors on such terms as to remuneration (including the payment of a commission varying with the amount of the company's profits), and with such powers and authorities, and for such period as they deem fit, and may revoke such appointment."

94. "The office of director shall be vacated . . . . (B.) if he become of unsound mind, bankrupt, or compound with his creditors . . . . (E.) if he be absent from the board meetings continuously for six months without the consent of the board."

96. "At the ordinary general meeting in the year next but one after the year in which the company is incorporated, and at the ordinary general meeting in every subsequent year, one-third of the directors for the time being, or if their number be not a multiple of three, then the number nearest to one-third shall retire from office. A managing director holding that office for an unexpired term shall not be subject to retirement under this

clause, or be taken into account in ascertaining the number of directors to retire."

101. "The company in general meeting may by an extraordinary resolution remove any director (other than a managing director holding that office for an unexpired term) before the expiration of his period of office, and may by an ordinary resolution appoint another qualified person in his stead . . . ."

It was agreed that the only question to be left to the jury should be the amount of damages, assuming that the plaintiff was entitled to damages.

The jury assessed the damages at 15,000*l.*

Scrutton J. gave judgment for the plaintiff. (1)

The defendants appealed. (2)

Younger, K.C., and *Montague Shearman, K.C.* (*A. M. Bremner* with them), for the defendants. Under article 85 (B.) of the articles of association of the defendant company the directors are given power to appoint a managing director, and they can only appoint him in accordance with the powers so given to them. It would be ultra vires if the directors purported to appoint a managing director without reserving to themselves power to revoke the appointment. Article 85 (A.) also gives power to the directors to establish local boards, local managing committees, or local agencies, and to appoint members thereof, and from time to time to revoke any such appointment. The company cannot interfere with the exercise of those powers by the directors: *Quin* v. *Salmon* (3); *Logan* v. *Davis* (4); and the directors can only exercise those powers in conformity with the authority conferred upon them by article 85. The case is concluded by the decision of this Court in *Bluett* v. *Stutchburys* (5), and the defendants are entitled to judgment. [*Eley* v. *Positive Assurance Co.* (6), *Imperial Hydropathic Hotel Co., Blackpool* v.

---

(1) [1913] 2 K. B. 471.

(2) The defendants also applied for a new trial upon the ground that the damages awarded by the jury were excessive, but the Court came to the conclusion that a new trial should not be ordered upon that ground. It is considered unnecessary to state the facts and arguments relating to this point or further to refer to it.

(3) [1909] 1 Ch. 311; [1909] A. C. 442.

(4) (1911) 104 L. T. 914.

(5) (1908) 24 Times L. R. 469.

(6) (1876) 1 Ex. D. 20, 88.

Hampson (1), and *Horn* v. *Henry Faulder & Co* (2) were also referred to.]

Leslie Scott, K.C., *Austen-Cartmell*, and *L. F. C. Darby*, for the plaintiff, were not called upon.

LORD READING C.J. This is an appeal by the defendants against a judgment of Scrutton J. in favour of the plaintiff for 15,000*l.*, which was the amount of the damages awarded by the verdict of the jury.

The argument which has been addressed to us turns upon the meaning of certain words, "and may revoke such appointment," in article 85 (B.) of the articles of association of the defendant company. The question therefore is a short one.

It is clear upon the facts that, unless the directors were entitled under those words of article 85 (B.) to revoke the appointment of the plaintiff as managing director, they had no ground whatever in law for putting an end to the agreement with him. Indeed it is not suggested that the directors had any such right apart from that article. The contention is that under article 85 (B.) the directors of the company, to whom the company had delegated its powers in this respect, were entitled to appoint a managing director or managing directors and to revoke any such appointment; that the effect of the article is that the directors could not make an appointment without reserving to themselves the right also to revoke the appointment, and that if they purported to make an appointment for a period of years without reserving to themselves the power of revocation they were acting ultra vires. The contention, put in another way, is that in any agreement for the appointment of a managing director into which the directors enter a clause must be implied giving them the right to revoke the appointment. Those are the alternative ways of putting the proposition which has been argued before us.

The material words of the articles, under the heading "Powers of Directors," are as follows: Article 84 provides that "the business of the company shall be managed by the board"; and article 85 provides that "without restricting the generality of the foregoing powers, the board may do the following things:—

(1) (1882) 23 Ch. D. 1.

(2) (1908) 99 L. T. 524.

(A.) Establish local boards, local managing committees, or local agencies in the United Kingdom or abroad, and appoint any persons to be members thereof, with such powers and authorities under such regulations, for such period, and at such remuneration as they may deem fit, and may from time to time revoke any such appointment. (B.) Appoint from time to time any one or more of their number to be managing director or managing directors on such terms as to remuneration . . . . and with such powers and authorities, and for such period as they deem fit, and may revoke such appointment."

The directors had entered into an agreement which may be described as one for the efficient business life of the plaintiff, subject to certain contingencies for which provision is made in the agreement. That is to say, subject to the contingencies specified in the agreement there was no power expressly reserved to the directors to determine the appointment at any time. The agreement reserved to the plaintiff the right to resign his office at any time by giving six calendar months' written notice, but there was no corresponding right reserved to the directors to determine the agreement. So long as the plaintiff remained a director of the company and retained his due qualification and efficiently performed the duties of his office, and well and faithfully served the company and attended to its business affairs, and so long as the company was not wound up and so long as he did not infringe the requirements of clause 7 as to his interest in other businesses, he was entitled to continue to serve the company and to be paid his salary at the rate of 3000*l.* a year.

The defendants do not allege that any one of those events to which I have referred has happened. They do not say that anything has taken place which would entitle them to put an end to the agreement. They rest their defence solely upon the contention that it is ultra vires the directors to make such an agreement without providing for the power of revocation by them at will, and that consequently the defendants are not liable. I am unable to accept that contention. It seems to me that the words in question in article 85 (B.) are clear, and they can be construed, by the application of the ordinary rules of construction, so as to give them a fair and reasonable meaning. Article 85 (B.) was framed for the purpose of giving certain specific powers to the directors of the company. Apart altogether from the general powers which are given to the directors under article 84, it was intended that the company should delegate to them the specific powers enumerated in article 85. One of those powers is to appoint a managing director—I draw particular attention to these words—"for such period as they deem fit." The directors therefore have under that part of the article power to appoint a managing director for a term of years, and the words which immediately follow—"and may revoke such appointment"—only give the directors power to take away that which they have given provided that they have not bound themselves to give it for any period of time. The directors have the power to appoint and the power to revoke the appointment, but the article does not mean that they have the power to revoke at will notwithstanding any agreement into which they may have entered for the appointment of a managing director for a term of years. I am quite unable to give the words the construction for which the defendants contend. If those last words had not been inserted in the article, the result would have been that the power to appoint a managing director would have been vested in the directors, but the power to revoke the appointment would have remained with the company. Both these powers are delegated to the directors, but the article does not make it a condition of any appointment which the directors may make, whether for a term of years or otherwise, that there shall be reserved to them a power of revocation.

Our attention has been called to a number of authorities. In my judgment they do not assist us in arriving at the true construction of the words I have been discussing in article 85 (B.) They are not decisions upon those words, or even upon similar words. I myself do not derive any assistance from cases dealing with other words in other articles in order to construe the articles of this company. I agree that the authorities are of value—and no doubt they were cited for this purpose—to shew what the law is with regard to the relative position of the directors and of the company when somewhat similar articles regulate their proceedings. But they do not, in my judgment, assist us upon the construction of the words before us, and therefore I do not propose to refer to them.

For these reasons I agree with the judgment of Scrutton J., and the appeal must be dismissed.

KENNEDY L.J. I am of the same opinion. Upon the true construction of article 85, it seems to me to be impossible to accept the view that the words "and may revoke such appointment" are to be read as requiring the directors to retain the power to put an end at will to any appointment they may make under clauses (A.) or (B.) of that article, although by the terms of the agreement into which they have entered they have stipulated that the appointment shall continue for a certain period. The word "revoke" must be read with its context. "Revoke an appointment" means, no doubt, to put an end to an appointment, but not necessarily to put an end to it without giving any notice where, for example, by the terms of the agreement it is provided that notice shall be given. The contention is that, if the appointment of a managing director is for a period of years or for life, the directors are entitled, and indeed bound if the interests of the company so require, under article 85 (B.) to revoke the appointment at any time even though no such power is given to them by the agreement under which the appointment is made. "Revoke," as I think the word must be read, is the correlative in article 85 (A.) and (B.) of "appoint." The directors may appoint and they may revoke. The natural word to use, as it seems to me, for the purpose of expressing the intention to put an end to the appointment is "revoke." I read the words "and may revoke such appointment" as meaning that the directors may put an end to the appointment, but inasmuch as they may make the appointment at such remuneration and for such period as they deem fit, they can only put an end to the appointment in accordance with the terms of the agreement, the making of which has been entrusted to them, under which the appointment was made.

With regard to the cases which were cited, I do not think that they help us. In *Logan* v. *Davis* (1) the question was whether

(1) 104 L. T. 914.

or not under the terms of certain articles of association of a company the appointment of a sole managing director was vested in the directors, or whether the company in general meeting could make the appointment. It was a question depending upon the construction of the particular articles. In the present case under article 85 (A.) the directors are entrusted with the appointment of the persons therein mentioned under such regulations, for such period, and at such remuneration as they may deem fit; and under article 85 (B.) they are entrusted with the appointment of a managing director on such terms as to remuneration and with such powers and authorities and for such period as they deem fit; and in either case they may revoke the appointment. The directors are given that power and that duty, which they are to exercise in the interests of the company, but at the same time they are not to break any contract which the company have empowered them to make, and which the company have divested themselves of the power of making or revoking. The appeal must therefore be dismissed.

SWINFEN EADY L.J. I am of the same opinion. The defendants by a resolution of their board on September 10, 1912, purported to revoke the appointment of the plaintiff as managing director of the company. There was no power of revocation contained in the agreement of January 16, 1908, under which the plaintiff was appointed. The plaintiff had entered into the agreement of January 16, 1908, which provided that he should hold the office so long as he remained a director of the company and retained his due qualification and efficiently performed the duties of his office. The defendants did not claim to terminate the appointment or to revoke it by virtue of any provision in the agreement, or by virtue of any contract whatever as between the plaintiff and the defendants. The contention is that, according to the true construction of the articles, the directors had only power to appoint the plaintiff to be a managing director subject to their right to revoke the appointment at any time; and that, if by entering into the agreement of 1908 they have purported to appoint the plaintiff without reserving to themselves the right to revoke the appointment at will, it is immaterial, because they had no power to do it. There is no question, they say, of the construction of the agreement, because it is conceded that according to the true construction of that agreement the appointment is not a revocable one. The point is that upon the true construction of the articles any appointment by the directors of a managing director may be revoked at any time.

Unless there is a power given to the directors by the articles to appoint a managing director it is not competent for them to make such an appointment. That was determined in *Boschoek Proprietary Co.* v. *Fuke*.(1) Therefore it is necessary to look at the articles to see what the power is. The articles may give a power to the directors to appoint one of their number to be managing director, but no power to revoke or cancel the appointment. The company may keep that power in its own hands to be exercised in general meeting. That would be the law if the company were registered with articles under Table A in Sched. I. to the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69). Art. 72 there provides: "The directors may from time to time appoint one or more of their body to the office of managing director or manager for such term, and at such remuneration . . . . as they may think fit, and a director so appointed shall not, while holding that office, be subject to retirement by rotation . . . . but his appointment shall be subject to determination ipso facto if he ceases from any cause to be a director, or if the company in general meeting resolve that his tenure of the office of managing director or manager be determined." With an article in that form it is manifest that the directors can only appoint a managing director subject to the right of the company in general meeting to resolve at any time that his tenure of the office of managing director is to be determined. That, however, is not the article which we have to construe. We have to construe article 85 (B.), and I will refer to two other articles which are of assistance in arriving at the true construction of that article. Article 85 (B.) gives the board power to appoint one or more of their number to be managing director or managing directors "for such period as they deem fit," and they "may revoke such appointment." That contemplates a definite period of

---

(1) [1906] 1 Ch. 148, at p. 159.

C. A.
1914

NELSON
v.
JAMES
NELSON
& SONS,
LIMITED.

Swinfen Eady
L.J

appointment, and not an appointment at the will and pleasure of the board. "Period" there means a definite period. That is emphasized by articles 96 and 101. Article 96 provides for the retirement of directors at the ordinary general meeting, but it provides that "a managing director holding that office for an unexpired term shall not be subject to retirement under this clause or be taken into account in ascertaining the number of directors to retire." That article contemplates that a managing director may be appointed for a term because it speaks of him as "holding that office for an unexpired term." Article 101 provides: "The company in general meeting may by an extraordinary resolution remove any director (other than a managing director holding that office for an unexpired term)." There again the same phrase is used. To my mind it is clear that these articles contemplate that the board may make an appointment of a managing director for a definite term. That is absolutely inconsistent with a power in the board to revoke the appointment at any time. If there were such a power its effect would be that the board would have no power to appoint for a term. If they had no power to appoint except upon the condition that the managing director should hold his office at the will and pleasure of the board—in other words, if they had power at any time to pass a resolution to determine the appointment—that would not be an appointment for a term. The term of the appointment in such a case would be purely nominal and fictitious if at any moment the board could say that, though the managing director was appointed for a term, he merely held office at their will and pleasure, and they thought it best in the interests of the company to determine the appointment. The words "and may revoke such appointment" are not in the form in general use. The more general form is that given in Palmer's Company Precedents, 11th ed., Part I., p. 738. It is article 102: "The directors may, from time to time, appoint one or more of their body to be managing director or managing directors of the company, either for a fixed term or without any limitation as to the period for which he or they is or are to hold such office, and may from time to time remove or dismiss him or them from office and appoint another or others in his or their place or places."

It is obvious that an article in that form, where there is power to appoint for a fixed term with power to remove or dismiss, means power to remove or dismiss subject to the terms of the existing contract between the managing director and the company. So in the present case the power to appoint and the power to revoke the appointment are in the board, but the power to revoke is to be subject to the terms of the contract for the time being between the managing director and the company.

For these reasons I am of opinion that the defendants have not the power which they claim to revoke the appointment during the currency of the term for which the appointment was made by merely passing the resolution.

Appeal dismissed.

Solicitors for plaintiff: *Lightbound, Owen & MacIver.*

Solicitors for defendants: *Ashurst, Morris, Crisp & Co.*

W. F. B.

ELIZABETH PETERS (WIFE OF EBENEZER PETERS) v. JONES.

[1913 P. 2122.]

1914
March 21.

Seduction—Master and Servant—Wife living with her Husband—Seduction of Wife's Adopted Daughter—Household Services rendered by Adopted Daughter—Pocket-Money and Clothes for Adopted Daughter provided out of Husband's Money—Whether Action will lie at Suit of Wife.

The principle on which an action for seduction is maintainable is not that there must be the relationship, or any quasi-relationship, of parent and child. The necessary and sufficient relation is that of master and servant.

An action was brought to recover damages for the seduction of a girl aged twenty-two, the adopted daughter of the plaintiff, a married woman. The plaintiff lived with her husband. The girl lived in the house with the plaintiff and her husband, and without any specific contract of service either with the plaintiff or her husband performed there the ordinary domestic services of the household. She was given by the plaintiff about 5*s.* a week for pocket-money. Her clothes also were provided for her. The clothes and pocket-money were provided out of the husband's money. At the trial evidence of the facts stated above was given, and that the defendant had seduced the girl. The plaintiff had no separate estate:—

Held, that the action would not lie at the suit of the plaintiff. The legal relationship of father and child did not by itself justify the maintenance of the action, which could be justified only by the legal fiction to which that relationship gave rise, namely, that a child living with the parent was a servant; and while the wife was living with her husband any ordinary domestic servant employed in the house was the servant of the husband and not of his wife.

Hamilton v. *Long* [1903] 2 I. R. 407; [1905] 2 I. R. 552 approved of.

FURTHER CONSIDERATION.

The action was brought to recover damages for the seduction of a girl aged twenty-two, the adopted daughter of the plaintiff, a married woman.

The statement of claim originally alleged that the girl who had been seduced was the sister and servant of the plaintiff. At the trial this description was amended and she was described as the adopted daughter and servant of the plaintiff.

The plaintiff, Mrs. Peters, lived with her husband. She adopted the girl in 1906. The girl lived in the house with the plaintiff and her husband, and without any specific contract of service either with the plaintiff or her husband performed there the ordinary domestic services of the household. She was given by the plaintiff about 5*s.* a week for pocket-money. Her clothes also were provided for her. The clothes and pocket-money were provided out of the husband's money. The plaintiff had no separate estate. The action was tried at Cardiff Assizes, before Avory J. and a special jury, when evidence of the facts stated above was given, and that the defendant had seduced the girl. The jury having found a verdict for the plaintiff for 25*l.*, the case was adjourned to London for further consideration as to whether the action would lie at the suit of the plaintiff.

Wilfred Lewis, for the plaintiff. The girl who was seduced was not a servant of the plaintiff in the strict sense. She was the adopted daughter of the plaintiff. The plaintiff therefore stood in loco parentis to the girl. As the adopted daughter the girl owed a duty to her adopted parent. Any one in loco parentis is entitled to maintain an action in respect of the seduction of his or her daughter: *Irwin* v. *Dearman*. (1) *Hamilton* v. *Long* (2) shews that the service must exist at the time of the debauching of the girl and also during her consequent illness.

---

(1) (1809) 11 East, 23.

(2) [1903] 2 I. R. 407.

That case is distinguishable upon the point as to the persons between whom the relationship of master and servant must exist. There the plaintiff's husband was the father of the girl. In the present case the plaintiff's husband was not the girl's father and she owes no duty to him.

Trevor Hunter, for the defendant. In order that an action for seduction will lie, the relation of master and servant must exist between the plaintiff and the girl who has been seduced. That is a contractual relationship. There need not be a binding contract in law, but there must be the contractual relationship. In the present case all the services rendered by the girl were in connection with the house. The husband shared in the benefit derived from them, and the girl was remunerated by and her clothes were bought with the husband's money. The services which represented that money were in law rendered to him: *Barrack* v. *M'Culloch* (1); *Birkett* v. *Birkett.* (2) The question is whether the wife acted as the husband's agent. Prima facie if a husband and wife are living together the wife has authority to act as his agent with regard to all matters fairly within the domestic department: *Phillipson* v. *Hayter* (3); *Morel Brothers & Co.* v. *Earl of Westmorland.* (4) If the girl was merely an adopted daughter of the wife but there was no relationship of service between them, the action will not lie at the suit of the wife. The question is whether the services were in law rendered to the husband or wife: *White* v. *Cuyler.* (5) If the wife has definite authority from her husband to make a contract she is not liable upon it: *Paquin* v. *Beauclerk.* (6) In the present case the wife could not upon the facts have been made liable for the girl's wages. [*M'George* v. *Egan* (7) was also referred to.]

Wilfred Lewis in reply. The girl was not in the strict sense the servant of either the husband or wife. If she had been actually engaged as a servant, it may be admitted that the wife would have contracted with her as agent for her husband. But there is no express contract of service. It is true that the husband shared in the benefit of the services, but so did the wife, and the girl looked upon her as her parent. The wife was the person to whom the girl owed the duty to render services.

---

(1) (1856) 3 K. & J. 110.

(2) (1908) 98 L. T. 540.

(3) (1870) L. R. 6 C. P. 38.

(4) [1904] A. C. 11.

(5) (1795) 6 T. R. 176.

(6) [1906] A. C. 148.

(7) (1839) 5 Bing. N. C. 196.

Avory J. In this action the statement of claim originally alleged that the girl who had been seduced was the sister and servant of the plaintiff. At the trial this description was amended and she was described as the adopted daughter and servant of the plaintiff. The plaintiff is the wife of Ebenezer Peters, and the question for decision is whether Mrs. Peters is entitled to maintain this action for the seduction of the girl, who for the purposes of this action may be treated as the adopted daughter of the plaintiff. On behalf of the plaintiff it has been contended that inasmuch as that fact is admitted or established, and as she in fact rendered services in the house, both at the time of the seduction and also at the time of the confinement, there is sufficient to entitle Mrs. Peters to sue, and that it is only a person who stands in loco parentis who can sue for damages for seduction. Now, that contention appears to me to be a violation of the real principle upon which this action can be maintained. I shall refer in a moment to the judgments in *Hamilton* v. *Long*. (1) But I wish to say for myself that the principle on which an action for seduction can be maintained is not, as the argument on behalf of the plaintiff suggests, that there must be the relationship of parent and child, or any quasi-relationship of parent and child, but that the relationship necessary is merely that of master and servant. And when one looks at the authorities in which it has been decided that a father may maintain the action in respect of a daughter who is under twenty-one years of age without proving any actual services rendered, but that if she is over twenty-one years of age he must give evidence of actual services rendered by the daughter, I think it is plain that the foundation of the action is not the relationship of parent and child but that of master and servant.

If I had had any doubt about that being the true principle I should turn to *Hamilton* v. *Long* (1), where the facts in my judgment gave rise to the very question of law that has to be determined in this case. In that case a daughter was seduced while her father and mother were alive and while she was living in their house. A child was born after the father's death, and the daughter continued to live with the widow. It was found as a fact that the daughter rendered ordinary household services to her mother after her father's death. In these circumstances it was held that an action could not be maintained by the widow either by virtue of the common law or the Married Women's Property Acts. Now it is admitted to be the law that the relationship which justifies the maintenance of the action must exist at the time of the seduction and also at the time of the illness consequent upon it that deprives the plaintiff of the girl's services. That being so, the Court in *Hamilton* v. *Long* (1) had to determine whether, if the services were rendered to the mother at the time of the illness, it could in that case be said that the services were also being rendered to the mother at the time of the seduction, and, if they were, whether the mother could maintain the action. The effect of the judgment was that as the father was alive and the daughter living in his house at the time of the seduction, he alone was the person who could have maintained the action, and that the mother could not, because at the time of the seduction the services were rendered to the father and not to the mother. If I had had any doubt upon the point, I should have willingly followed this decision of Lord O'Brien C.J., Gibson J., and Madden J., for although the decision is not binding upon me it is of great authority.

---

(1) [1903] 2 I. R. 407.

Lord O'Brien C.J. said: "Now, at common law the action would not, in my opinion, be maintainable for this reason, namely, that to sustain an action of seduction it must be shewn that the act of seduction took place while the relation of master and servant existed, and that relation in the father's lifetime existed exclusively between the father as head of the family, and the daughter as his child, and one of the family and one of the household which he maintained." He then deals with the Married Women's Property Acts and finds that there is nothing in those Acts which alters the position which the wife occupies at common law in respect of this matter. Gibson J. said: "The action is founded on a wrongful interference, to the master's injury, with a subsisting relationship of master and servant. Such relationship is supported by acts of service voluntarily rendered without any enforceable contract, but the service must be to some one whom the law recognizes as master. The question here is who was the master? At common law certainly it was the father. He and his wife were one. As head of the family he was guardian of his daughter during minority, and when she became adult, so long as she resided under his protection in the family home, he was regarded as master in respect of all services yielded to or for him in the course of family duty. There is no trace of suggestion in the English law books that a mother during the father's lifetime could be regarded at common law as mistress" (that means mistress of the servant) "jointly with her husband or separately. She was merged in her husband." Madden J. said: "So long as the plaintiff's daughter was an infant living under the dominion of her father, he was in law entitled to her services. After she became sui juris some evidence of actual services rendered in the household became necessary in order to give rise to the legal fiction of the existence between parent and child of the contractual relation of master and servant upon which the action of seduction is founded." That decision was approved in the Irish Court of Appeal (1) by Lord Ashbourne L.C. and FitzGibbon, Walker, and Holmes L.JJ. I hold exactly the same view as was expressed in that case. In my judgment the action can only be maintained by proof of an actual or implied contract of service. The relationship of parent and child gives rise to the legal fiction that there is a contract of service. The legal relationship of father and child does not by itself justify the maintenance of the action. The maintenance of the action is only justified by the legal fiction that a child living with the parent is a servant, and the action is maintainable where the daughter is under twenty-one years of age without any proof of actual services rendered, but after that age is passed there must be proof of actual services.

---

(1) [1903] 2 I. R. 407.

(1) [1905] 2 I. R. 552.

That being the principle, the question in this case is between whom did the relationship of master and servant exist. On behalf of the plaintiff it has been contended that because Mrs. Peters stood in loco parentis she alone was the person who could maintain this action, and that the husband would not have been entitled to sue; that as there was no actual contract of service, such services as were rendered must be deemed to have been rendered to the plaintiff, Mrs. Peters. But the passages I have read from the judgments in the Irish case of *Hamilton* v. *Long* (1) shew that while Mrs. Peters was living with her husband any ordinary domestic servant employed in the house was the servant of Mr. Peters and not of his wife. Whether such a servant was paid wages or whether she was remunerated by gifts of clothes or pocket-money is, I think, immaterial. The moment that one appreciates that the action is based on the relationship of master and servant and not on that of parent and child one sees that the only question for determination is, who was the girl's master at the material times? There is only one answer to that question. Mr. Peters was the master; Mrs. Peters was not the mistress of the servant, and so she was not entitled to bring this action and, being a person admittedly without any separate property of her own, cannot be rendered liable for the costs of it. No application was made to me to add Mr. Peters as a plaintiff. In my opinion the plaintiff was not entitled to maintain this action, and there must be judgment for the defendant.

Judgment for defendant.

Solicitors for plaintiff: *Smith, Rundell & Dods, for Harold M. Lloyd, Cardiff.*

Solicitors for defendant: *Fielder, Jones & Harrison, for R. E. Williams, Ebbw Vale.*

(1) [1903] 2 I. R. 407.

J. E. A.

1914
March 17, 26.

PYMAN STEAMSHIP COMPANY *v.* HULL AND BARNSLEY RAILWAY COMPANY.

Dock—Contract for Use of—Unfitness of Equipment of Dock—Damage to Ship—Exemption Clause in General Words—Liability of Dock Owner.

The defendants were the owners of a graving dock, which the plaintiffs' ship used under a contract for reward. By the terms of the contract the defendants supplied the necessary blocks for supporting the vessel when in the dock. The contract also provided that "The owner of a vessel using the graving dock must do so at his own risk, it being hereby expressly provided that the company are not to be responsible for any accident or damage to a vessel . . . . whilst in the graving dock, whatever may be the nature of such accident or damage or howsoever arising." Owing to the negligence of the defendants the blocks upon which the keel of the plaintiffs' ship rested were uneven in height, whereby she suffered damage:—

Held, that although general words in a contract exempting the contractor from liability for damage caused by a breach of his contractual duty may be inoperative to excuse him where the duty is a prima facie absolute duty, such as that of a shipowner under a contract of affreightment to provide a seaworthy ship, it is otherwise where the contractor's obligation is only to exercise due care; that the prima facie duty of the defendants was not an absolute duty to provide blocks reasonably fit for the purpose for which they were to be used, but only a duty to take care that they were reasonably fit; and that the exemption clause, although expressed in general words, operated to exempt them from liability for the damage resulting from their unfitness.

TRIAL of action before Bailhache J. without a jury.

The plaintiffs were the owners of the steamship *Marmion*, and the defendants were the owners of a graving dock at Hull. In February, 1913, the *Marmion* was received by the defendants into their graving dock for reward upon the terms of an agreement in writing.

By the terms of the agreement, clauses 11 and 12, the defendants were to provide blocks and block caps. The charge for the blocks, which were made of iron, were included in the charge for the use of the dock. For the block caps, which were of soft wood in order to give to the pressure of the vessel's keel, and which required frequent renewal, a separate charge was made. The agreement also provided by clause 9 as follows:—" The

1914

PYMAN STEAMSHIP COMPANY *v.* HULL AND BARNSLEY RAILWAY.

owner of a vessel using the graving dock must do so at his own risk, it being hereby expressly provided that the company are not to be responsible for any accident or damage to a vessel going into, or out of, or whilst in the graving dock, whatever may be the nature of such accident or damage or howsoever arising." Owing to the neglect of the defendants to exercise due care in placing the blocks and caps in position at the bottom of the dock, the tops of the blocks on which the *Marmion* rested were uneven in height, whereby a strain was caused to the vessel's frame and her forefoot plates were set up and damaged. The defendants by way of defence relied upon the above-mentioned clause as exempting them from liability.

Roche, K.C., and *Raeburn*, for the plaintiffs. The obligation of the defendants under the contract was an absolute obligation to provide a dock properly equipped with blocks and block caps reasonably fit for the purpose of docking a ship. The duty of the dock owner in this respect stands on the same footing as that of a shipowner under a contract of charterparty or affreightment to supply a seaworthy ship, a duty which unless qualified in express terms amounts to a warranty. So too the duty of a tug owner under a contract of towage has been held to be an absolute duty to supply a tug duly equipped and fit for service: per Sir Samuel Evans P. in *The West Cock.* (1) On this case being taken to the Court of Appeal (2) it became unnecessary to decide the point, but the Lords Justices did not dissent from the President's proposition. Then if the duty be absolute, general words of exemption from liability for damage are unavailing to protect the party on whom the duty lies against the consequences of its breach. This has long been the settled rule in respect of the warranty of seaworthiness; if the shipowner wishes to protect himself he must clearly stipulate for that protection. The same principle must apply to exemption from liability for not providing a safe dock, and the defendants cannot rely on the exemption clause, which is in general terms. Where the owners of a graving dock undertook to do certain repairs to a ship and for that purpose to transport her from berth to dry dock and to provide all items of transportation, and during the transportation the ship got adrift from the inefficiency of the towage gear and suffered damage, the dock owners were held responsible notwithstanding that the contract provided that "all transporting to be at owners' risk": *The Forfarshire.* (1)

---

(1) [1911] P. 23.

(2) [1911] P. 208.

Maurice Hill, K.C., and *Moss Blundell*, for the defendants. There is no implied warranty by a dock owner or wharfinger that the bottom of his dock or the bed of the river adjoining his wharf is safe for a vessel to lie on; his obligation is limited to taking reasonable care that it is safe: *The Moorcock* (2); *The Bearn.* (3) The implied warranty by a shipowner of the seaworthiness of his ship is exceptional, and the principle of that class of cases is not to be extended to other subjects. It is true that in *The West Cock* (4) the President held that a contract of towage contained an implied warranty of the fitness of the tug, but in the Court of Appeal (5) Farwell L.J., though he did not dissent from that view, said that he was not without further argument prepared to assent to it. On the assumption then that the prima facie obligation of the defendants was only to take reasonable care to see that the blocks were fit for the reception of the vessel, the exemption clause afforded them protection from liability. In such a case it is no objection that the exemption is by general words. In *Chartered Bank of India* v. *British India Steam Navigation Co.* (6), where bills of lading provided for a cesser of the shipowners' liability as soon as the goods were "free of the ship's tackle," Lord Macnaghten (at p. 375), referring to the rule that a shipowner who wishes to relieve himself from liability to the shipper for the unseaworthiness of his ship must say so plainly, said: "But their Lordships do not recognize any very close analogy between a case where it is sought to get rid of a legal obligation, which is presumed to be the basis of every contract of carriage by sea, and a case like this, where the parties are perfectly free to make any stipulation they please, unembarrassed by any implied condition or any original underlying obligation." Here the general words "whatever

(1) [1908] P. 339.
(2) (1889) 14 P. D. 64.
(3) [1906] P. 48.
(4) [1911] P. 23.
(5) [1911] P. 208, at p. 226.
(6) [1909] A. C. 369.

may be the nature of such accident or damage or howsoever arising" must be interpreted as meaning what they say, that is to say, as being of universal application, and as intended to exonerate the defendants even from the consequences of their own negligence. In *The Stella* (1), where a passenger was given a free pass from London to Jersey on the terms that the company were to be relieved from all responsibility "for any injury however caused," those words were held to cover injury caused by the negligence of the company's servants. The same principle was applied in *Gallin* v. *London and North Western Ry. Co.* (2), where the plaintiff while travelling on the defendants' line at his own risk was damaged by conduct on their part which would have been negligence in the case of an ordinary passenger. In *Austin* v. *Manchester, Sheffield and Lincolnshire Ry. Co.* (3), where a horse which was being carried by the defendants on their railway on the terms that they were not to be liable "for any damages however caused" was injured from the firing of a wheel in consequence of the neglect of the company's servants to grease it, the company were excused. In *Taubman* v. *Pacific Steam Navigation Co.* (4) a provision that the company were not to be liable for loss of luggage "under any circumstances whatsoever" was held to cover loss by wilful default of the crew. The cases of *Allan* v. *James* (5) and *Wade* v. *Cockerline* (6) are to a similar effect. If the exception of negligence will protect the defendants from liability for negligent management of their dock after the ship has entered it, it must equally protect them in respect of negligence occurring before the ship entered, such as in providing a dock with a level bottom. In *The West Cock* (7), where the cause of the damage was a defect in the tug existing before the towage began, it is true that the tug owners were held responsible by the Court of Appeal even on the assumption that the defendants' obligation was not absolute, but in that case there were no general words exempting them from liability for damage "however caused" as in the above-mentioned cases.

---

(1) [1900] P. 161.
(2) (1875) L. R. 10 Q. B. 212.
(3) (1850) 10 C. B. 454.
(4) (1872) 1 Asp. M. L. C. 336.
(5) (1897) 3 Com. Cas. 10.
(6) (1904) 10 Com. Cas. 47.
(7) [1911] P. 23.

1914

PYMAN STEAMSHIP COMPANY
v.
HULL AND BARNSLEY RAILWAY.

The Lords Justices went on the ground that from the language of the condition it was to be inferred that the parties intended it to apply only to negligence in the towage itself. The explanation of *The Forfarshire* (1) is that Bargrave Deane J.'s decision was, like that of the President in *The West Cock* (2), based on the assumption that the defendants warranted the efficiency of the means of transportation, and that consequently general words of exemption were unavailing to protect them from the consequences of their breach of duty.

Roche, K.C., in reply. If the defendants are right the exemption clause would protect them even if they supplied no blocks at all, and it cannot be supposed that they intended that result. The cases cited relating to the effect of exceptions in a contract of carriage are not in point. They stand on a different footing from the present case, where the contract is to supply something for use. The party who for reward supplies a thing for use warrants that it is fit for use. The agreement in the present case contained twenty-one clauses, and the portion of the clause relied on by the defendants, clause 9, coming as it does in the middle of the agreement, suggests that it was intended only to apply to the clauses which preceded it, and not to the clauses dealing with the provision of blocks and block caps, which come later, clauses 11 and 12.

Cur. adv. vult.

March 26. BAILHACHE J. read the following judgment:—The plaintiffs' steamship *Marmion* suffered bottom damage in the defendants' No. 1 dry dock in February, 1913, by reason of the unevenness of the block caps upon which she rested. The block caps were provided by the defendants for reward, and I find as a fact that their unevenness was due to want of due care upon the defendants' part. The plaintiffs seek to recover damages in respect of this injury to their steamship, and I assess the damages at 284*l.*

The defendants are a railway company, but they have no statutory provisions affecting their rights or liabilities as dry dock owners. The *Marmion* went into dock for painting. The defendants did not do the painting, but merely let the use of this dock for the purpose. The *Marmion* entered the dock and remained there under a contract with the defendants dated January 30, 1913. Under this contract dock dues were charged. There were also pumping charges, and charges for the use of the block caps. The blocks are of the usual description,—iron, then hard wood, and then soft wood caps upon which the keel rests. These last are purposely of soft wood to give to the weight of the vessel, and they require inspection and renewal from time to time. There was little dispute as to the facts, and the defence was based upon clause 9 of the defendants' regulations, which were by reference made part of the contract. The material part of clause 9 runs thus: "The owner of a vessel using the graving dock must do so at his own risk, it being hereby expressly provided that the company are not to be responsible for any accident or damage to a vessel going into, or out of, or whilst in the graving dock, whatever may be the nature of such accident or damage or howsoever arising." On the facts as stated it is clear that the accident or damage to the *Marmion* was sustained by her when in the dock, and is thus within the words of the clause used in their ordinary significance.

---

(1) [1908] P. 339.

(2) [1911] P. 23.

It was urged for the plaintiffs that the clause did not excuse the defendants for three reasons. One, which I notice first as it is the shortest to dispose of, was the position of the clause in the regulations, No. 9 out of twenty-one, the regulation as to provision of blocks being No. 11; and it was said that I ought to infer from this that clause 9 was not intended to apply to or qualify the defendants' liability under clause 11. I cannot accede to this argument. The clause is perfectly general in its terms. It has no special relation to the clauses which precede it, and I regard its number and position as accidental.

The next point raised was that the clause does not in terms refer to negligence of the defendants' servants, and that the words ought to be construed in some narrower sense than they bear on the face of them, and was referred to that long line of cases of which *Price* v. *Union Lighterage Co.* (1) is the one now most often cited on this point. Those cases shew that where

(1) [1903] 1 K. B. 750.

words are capable of two constructions, one of which excludes and the other includes negligence, the meaning which excludes negligence is to be preferred. Here the words seem to be capable of only one construction, and to offer no alternative, and unless there is, as was suggested by the plaintiffs, some other reason why they do not cover this case I must give them their full effect, as has been done in a series of cases not less authoritative than the *Price* v. *Union Lighterage Co.* cases. I may mention as illustrations such cases as *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Brown* (1) and *The Stella.* (2)

The third point taken by the plaintiffs was that this clause 9 cannot be applied to this case at all, and for this I was referred to the unseaworthiness cases. It was said that this was an analogous case, and I was asked to apply to it the well-known rule which prevails in cases of carriage by sea, that general words however wide do not cover damage due to the failure to provide a seaworthy ship unless they are express upon the point. The defendants on the other hand, while agreeing that in a shipping case unseaworthiness would not be covered by clause 9, argued that the unseaworthiness cases are a class apart, and that the doctrine which applies in unseaworthiness cases ought not to be applied to any other class of cases. I am not sure that the unseaworthiness cases are a class apart. I incline to think that the doctrine that general words do not excuse unseaworthiness is not founded upon any law peculiar to a ship, but depends upon the nature and force of a shipowner's obligation if unqualified by his contract, and that the same doctrine would apply to a dry dock if a dry dock owner was under the same obligation to supply a shipworthy dock as a shipowner is under to supply a seaworthy ship. The obligation of a shipowner in this regard has been described by Lord Sumner, dealing with the words "at shipper's risk," in *The Galileo* (3), as fundamental. It is a convenient and needless to say apt word, and I am glad to borrow it, but in doing so I had better perhaps define what I mean by it. By fundamental I mean an obligation the fulfilment of which is the basis of the contract, and in regard to

(1) (1883) 8 App. Cas. 703.
(2) [1900] P. 161.
(3) [1914] P. 9.

the fulfilment of which considerations of due care or the want of due care are immaterial and irrelevant. I am disposed to think that whenever such a fundamental duty is imposed or undertaken, whether in respect to a ship or a dock, general words of immunity from liability for damage would not cover damage resulting from breach of that duty unless they did so in express terms, however wide the exonerating clause might otherwise be. This distinction between the applicability or non-applicability of general words of exemption according to whether the loss is due to the breach of a fundamental duty as defined, or of a duty to use due care, is recognized in shipping cases and is well illustrated by the two following cases:—In *Tattersall* v. *National Steamship Co.* (1) the obligation to provide a seaworthy ship was fundamental. The contract was for the carriage of cattle. The holds had been insufficiently cleaned, and the cattle caught foot and mouth disease. The bill of lading contained this clause: "It is hereby expressly agreed that" the shipowners "are as respects these animals in no way responsible . . . . for accidents, disease, or mortality, and that under no circumstances shall they be held liable for more than 5*l.* for each of the animals." Held no protection, and the shipowner had to pay the full value of the cattle. On the other hand, in *Morris* v. *Oceanic Steam Navigation Co.* (2) the obligation to provide a seaworthy ship was qualified by a provision that the owner should not be liable for unseaworthiness provided that he had exercised due diligence to make the vessel seaworthy. There was also a clause limiting his liability to $100 a package unless otherwise declared. He had failed to take due care to make his ship seaworthy, and the goods (cigars) suffered damage in consequence. His liability was none the less held to be limited to the $100 a package. In other words a clause which would have been no protection against the fundamental obligation of seaworthiness was a protection against failure to exercise due care to provide a seaworthy ship.

I need not pursue the matter further in the view I take of the dock owner's duty as to the blocks in this case, and which I will express in a few moments. I have considered the point in

(1) (1884) 12 Q. B. D. 297.

(2) (1900) 16 Times L. R. 533.

deference to the arguments addressed to me upon it, but it does not fall for actual decision. I should have needed to decide it if the accident had been due to some error in the dimensions of the dock. Those dimensions are set out at the top of the regulations, and the duty to provide a dock of those dimensions is, I think, fundamental. Here, however, the question is as to the blocks. The general safety and equipment of the dock and in particular of the blocks is not the matter of special contract in this case, and the dock owner's obligation in regard to the blocks depends upon the general law on the subject. Is his duty fundamental, i.e., is his duty to provide blocks reasonably fit for the purpose, or is it to use due care to see that they are fit? I think it is the latter. This was the view taken by Blackburn J. in advising the House of Lords in *Mersey Docks and Harbour Board* v. *Gibbs* (1), where (at p. 107) he says of a person using and paying for the use of a dock or warehouse, "He pays the rates for the dock accommodation or for warehouse accommodation and services, and he is entitled to expect that reasonable care should be taken that he shall not be exposed to danger in using the accommodation for which he has paid."

It only remains to refer to two cases specially relied on by the plaintiffs. One was *The West Cock.* (2) That was a towage case and the towing gear was defective, but it is of little assistance because upon the special words of the exemption clause the Court of Appeal held that, whether the defendants' duty was to provide a seaworthy tug or to use due care, in either case the clause was no protection, as by its terms it was limited in its operation to circumstances occurring after the commencement of and during the continuance of the towage. The other case was *The Forfarshire.* (3) That was a case in which the defendants, the London Graving Dock Company, undertook to repair the plaintiffs' vessel *Forfarshire* and to transport her to dry dock, finding all tugs, men, and boats, sufficient hands for managing ship, and all items of transportation to loading berth. By a marginal clause all transporting was to be "at owners' risk." The defendants failed to provide an additional tug which proved to be necessary, and it was held that the marginal clause did not protect them. The plaintiffs in this case say that the learned judge treated the failure to provide an additional tug as negligence, and yet held that the words "at owners' risk" did not exonerate the dock company. I am not sure that the learned judge did so treat the case, but if he did I think it is my duty, with all respect to him, to adhere to the principle which I have indicated and which is I think in accord with the general current of authority. I may add that the words with which I have to deal are, if not wider than those in *The Forfarshire* (1), at any rate more emphatic. I hold that clause 9 applies, that it covers negligence and renders the defendants immune from liability for the condition of the blocks, and I give judgment for them with costs.

---

(1) (1866) L. R. 1 H. L. 93.
(2) [1911] P. 23.
(3) [1908] P. 339.

Judgment for defendants.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *Davenport, Cunliffe & Blake, for Moss, Lowe & Co., Hull.*

J. F. C.

---

(1) [1908] P. 339.

1914
March 23.

LEONARD *v.* HOARE & CO., LIMITED AND ANOTHER.

Local Government—Buildings—By-laws—Infringement—Part of Old Building pulled down and New Part erected—"New building"—Plans of whole Building—Public Health Acts Amendment Act, 1907 (7 *Edw.* 7, *c.* 53), *s.* 23.

Sect. 23 of the Public Health Acts Amendment Act, 1907, provides as follows: "For the purposes of this Act and the Public Health Acts, and any by-laws made thereunder, each of the following operations, namely: (*a*) the re-erection, wholly or partially, of any building of which an outer wall is pulled down or burnt down to or within ten feet of the surface of the ground adjoining the lowest storey of the building . . . . shall be deemed to be the erection of a new building."

A local authority's by-law provided that "Every person who shall intend to erect a building shall give to the council notice in writing of such intention . . . . and shall at the same time deliver or send . . . . complete plans and sections of every floor of such intended building . . . ."

The respondents pulled down part of an old building including certain outer walls, leaving the remaining part of the premises standing. The old part of the premises was erected before building by-laws came into existence. The respondents gave notice in writing to the local authority of their intention to erect on the site of the part pulled down a new part, and with that notice they sent plans and sections of the new part, but they gave no notice as to, or plans or sections of, the whole building, that is, the part left standing and the new part:—

Held, that under s. 23 of the Public Health Acts Amendment Act, 1907, the whole building, that is, the old part and the new part, was to be deemed to be a new building, and therefore the respondents were bound to send notice as to, and plans and sections of, the whole building to the local authority.

CASE stated by justices of Kent.

The respondents were summoned for having on March 19, 1913, failed to comply with the provisions of by-law 104 made by the Foots Cray Urban District Council, in that, intending to erect a building in the district, they failed to deliver or send to the council notice in writing of such intention, and failed to deliver or send complete plans and sections of every floor of such intended building.

The by-law, which was made and approved in 1906, was in these terms: "Every person who shall intend to erect a building shall give to the council notice in writing of such intention . . . .

and shall at the same time deliver or send, or cause to be delivered or sent . . . . complete plans and sections of every floor of such intended building . . . . and shall show the position, form, and dimensions of the several parts of such building . . . ."

The appellant was the clerk to the urban district council; the first respondents were the owners of the Seven Stars Inn, and the second respondent was a builder.

By order of the Local Government Board, dated December 24, 1909, s. 23 of the Public Health Acts Amendment Act, 1907 (1), was in force in the district.

The second respondent, on the instructions of the first respondents, pulled down to the level of the ground part of the Seven Stars, including the outer wall on the south-easterly side and part of the outer walls on the south-westerly and north-easterly sides, leaving the remaining part of the premises standing. The old part of the premises was erected before building by-laws came into existence.

Notice in writing of the respondents' intention to erect the new part of the building, accompanied by plans, was given by the respondents, but no notice as to, or plans and sections of, the whole building, including the part left standing, were given to the council.

The appellant admitted that if the portion of the old building left standing was not, and should not be treated as part of, a new building, by-law 104 had been complied with by the respondents. The respondents admitted that if that portion should be treated as part of a new building the by-law had not been complied with.

On behalf of the appellant it was contended that under by-law 104 notice as to and plans and sections of the whole building, i.e., the part left standing and the part to be newly erected, and not merely as to and of the part to be newly erected, were required to be given to the council, inasmuch as the whole constituted a new building, or was, under s. 23 of the Public Health Acts Amendment Act, 1907, to be deemed the erection of a new building.

---

(1) Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), s. 23: "For the purposes of this Act and the Public Health Acts, and any by-laws made thereunder, each of the following operations, namely:—

"(a) The re-erection, wholly or partially, of any building of which an outer wall is pulled down or burnt down to or within ten feet of the surface of the ground adjoining the lowest storey of the building, ...

"(d) The making of any addition to an existing building by raising any part of the roof, by altering a wall, or making any projection from the building, but so far as regards the addition only; . . . . shall be deemed to be the erection of a new building."

On behalf of the respondents it was contended that under by-law 104 notice as to and plans and sections of the building to be newly erected were to be given, and not plans and sections of the old building to be left standing, and that the only re-erection contemplated or intended by them was of the portion pulled down.

The justices were of opinion that the re-erection of the building on the portion pulled down constituted a partial re-erection of a building within s. 23 of the Act of 1907, that such partial re-erection only should be deemed to be the re-erection of a new building, and that such partial re-erection was the only new building intended to be erected by the respondents. They therefore found that by-law 104 had been sufficiently complied with, and they accordingly dismissed the information.

Danckwerts, K.C. (*Jeeves* with him), for the appellant. The justices have misconstrued s. 23 of the Act of 1907. The whole of this building, that is, the old part together with the new part erected on the site of the part pulled down, constitutes a new building within the meaning of the section, there being, within clause (*a*) of the section, the re-erection, partially, of a building of which an outer wall has been pulled down. It is all-important that the local authority should have notice as to, and plans and sections of, the whole building in order that they should see how the new part fits in with the old.

[He was stopped.]

Freeman, K.C. (*A. H. Poyser* with him), for the respondents. The justices were right in dismissing the information. Sect. 23 of the Act of 1907 cannot have the construction sought to be put upon it by the appellant, for, if it does, it involves this, that as soon as an outer wall of a Tudor or Elizabethan house is pulled down and a new part is intended to be erected a notice and plans and sections of the whole building will have to be sent in to, and be approved by, the local authority. That cannot have been intended. The object of notices and plans is to enable the local authority to insist upon the building by-laws being complied with in reference to the building to be erected. Notice as to and plans of the building the respondents are erecting have been sent to the local authority. The re-erection, wholly or partially, of a building within s. 23 (*a*) does not mean the re-erection of the whole building, but means the re-erection upon the area on which the part pulled down stood. The respondents did not pull down the outer wall of any building other than that which they are going to re-erect. It is an undue straining of language to say that plans must be sent in of the old part of the building which the respondents do not propose to touch. The argument for the appellant gives no meaning to the word "operation" in s. 23. That word shews that it is something which the respondents do which affects the matter, not something which they do not do. The whole "operation" by the respondents was in respect of the new part of the building.

Bray J. In view of the admissions set out in the case the question we have to consider is a small one. It is this: Are we to look at the whole of this building or only to look at part? The building was one building and is one now; it does not consist of two buildings, and what we have to determine is whether that building, by virtue of the operation of something done to it, is a new building. In my opinion it is, because of s. 23 of the Public Health Acts Amendment Act, 1907, which provides inter alia that "the re-erection, wholly or partially, of any building of which an outer wall is pulled down or burnt down to or within ten feet of the surface of the ground adjoining the lowest storey of the building . . . . shall be deemed to be the erection of a new building." "Any building" is the whole building, and as I have said there was but one building here. Of that old building an outer wall has been pulled down, and there has been a partial re-erection of that building. Therefore the by-law applied, and the appeal must be allowed.

1914

LEONARD
v.
HOARE & CO.,
LIMITED.

AVORY J. I am of the same opinion, and I only add a word or two to shew that the Court appreciate the point put forward by Mr. Freeman, which was, that s. 23 should be read as meaning that the part re-erected of any building shall be deemed to be the erection of a new building. If we can so construe the section Mr. Freeman would undoubtedly be right. It is impossible, however, to hold that that is the real meaning of the words used. The words are: "The re-erection, wholly or partially, of any building of which an outer wall is pulled down . . . . shall be deemed to be the erection of a new building." As soon as any part of a building is re-erected, the whole building is to be deemed to be a new building; the section does not mean that the part which has been re-erected is to be deemed to be the new building. If the whole building is to be deemed a new building, by-law 104 requires building plans and sections of every floor of the building to be sent in. I will only add this, that these by-laws were sanctioned before the passing of the Act of 1907, and possibly these and similar by-laws may require consideration and amendment in view of the provisions of that Act.

ROWLATT J. I agree. It seems to me that clause (*a*) of s. 23 proceeds upon the footing that when an outer wall of a building is pulled down or burnt down, and that building is re-erected, wholly or partially, it is to be deemed to be the re-erection of the building. The question is, what is the building? What is the unit which is being dealt with? It is quite clear that the whole of the building in this case was one building, and as an outer wall of that building has been pulled down and as the building is to be re-erected, wholly or partially, the re-erection is to be deemed to be the erection of a new building.

Appeal allowed: Case remitted.

Solicitors for appellant: *White & Leonard.*
Solicitors for respondents: *Sandilands & Co.*

J. S. H.

HOLLIDAY AND GREENWOOD, LIMITED, APPELLANTS *v.* DISTRICT SURVEYORS' ASSOCIATION AND DICKSEE, RESPONDENTS.

1914
March 4.

London — Building Notice — New Buildings — Public Elementary School — Alterations — " Provision dealing with construction of new buildings " — London Building Act, 1894 (57 *&* 58 *Vict. c. ccxiii.*), *s.* 145—*Education* (*Administrative Provisions*) *Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 32), *s.* 3.

By s. 145 of the London Building Act, 1894, where a building is about to be begun, then two clear days before it is begun the builder or other person causing or directing the work to be executed shall serve on the district surveyor a building notice as therein prescribed. By s. 200, sub-s. 11, any person who, being a person who ought to serve a building notice, fails to do so is liable to a penalty.

By s. 3 of the Education (Administrative Provisions) Act, 1911, the provisions of any by-laws made by any local authority under s. 157 of the Public Health Act, 1875, with respect to new buildings (including provisions as to the giving of notices and deposit of plans and sections), and any provisions in any local Act dealing with the construction of new buildings, shall not apply to the case of any new buildings being school premises to be erected according to plans which are required to be and have been approved by the Board of Education.

A firm of builders had entered into a contract with the London County Council as the education authority for the county of London for the erection of certain new buildings to be erected as a public elementary school according to plans approved by the Board of Education. No building notice was given to the district surveyor. The builders were convicted of an offence under the London Building Act, 1894. Upon a case stated:—

Held, that s. 145 of that Act was a provision in a local Act "dealing with the construction of new buildings" within the meaning of s. 3 of the Education (Administrative Provisions) Act, 1911, and therefore did not apply to the buildings in question; and consequently that the conviction was wrong.

CASE stated by a metropolitan police magistrate.

Informations were laid on behalf of both respondents by the respondent Dicksee, the district surveyor for the district of Newington and part of the parish of St. George the Martyr, Southwark, in pursuance of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 145 (1), wherein the appellants were

(1) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 145: "In the following cases and at the following times (that is to say):— (*a*) Where a building or structure or work is about to be begun then two clear days before it is begun . . . . the builder or other person

1914

HOLLIDAY AND GREENWOOD, LIMITED *v.* DISTRICT SURVEYORS' ASSOCIATION AND DICKSEE.

charged (*a*) for that they on October 8, 1912, at and in respect of the London County Council's school known as the Paragon school, Searles Road, New Kent Road, in the borough of Southwark, within the district of the said district surveyor, being persons who ought to serve upon him a building notice in respect of the said school, did fail to do so contrary to the provisions of the Act, and (*b*) for that the appellants on November 26, 1912, at and in respect of the London County Council's school in Victory Place New Building in the borough of Southwark, within the district of the said district surveyor, being persons who ought to serve upon him a building notice, did fail to do so contrary to the provisions of the Act, and (*c*) for that the appellants on or

---

causing or directing the work to be executed shall serve on the district surveyor a building notice respecting the building or structure or work. Every building notice shall state the situation area height number of storeys and intended use of the building or structure and the number of buildings or structures if more than one and the particulars of the proposed work and the name and address of the person giving the notice and those of the owner then in possession of and the occupier of the building or structure or of its site or intended site. All works in progress at the same time to in or on the same building or structure may be included in one building notice."

Sect. 200: "Subject to the provisions of this Act every person who does any of the things specified in this section shall be deemed to have committed an offence against this Act and shall be liable upon conviction in a summary manner to a penalty not exceeding the amount hereafter specified in connection with such offence and to a further penalty not exceeding the amount hereafter stated as the daily penalty in connection with such offence for every day on which the offence is continued after such conviction (that is to say) . . . ."

Sub-s. 11: "Any person who . . . . (*b*) being a person who ought to serve a building notice fails to do so . . . . shall be liable to a penalty not exceeding forty shillings and to a daily penalty not exceeding the like amount."

Education (Administrative Provisions) Act, 1911 (1 & 2 Geo. 5, c. 32), s. 3: "The provisions of any by-laws made by any local authority under section 157 of the Public Health Act, 1875, as amended by any other Act, with respect to new buildings (including provisions as to the giving of notices and deposit of plans and sections), and any provisions in any local Act dealing with the construction of new buildings, and any by-laws made with respect to new buildings under any local Act, shall not apply to the case of any new buildings being school premises to be erected, or erected, according to plans which are under any regulations relating to the payment of grants required to be, and have been, approved by the Board of Education."

about September 6, 1912, at and in respect of the London County Council's school in Victory Place aforesaid (alterations to existing buildings), being persons who ought to serve a building notice, did fail to do so.

The magistrate convicted the appellants on each of the informations and imposed a penalty in each case. At the request of the appellants he stated the following

CASE.

At the hearing of the informations, which were by consent of the parties heard together, the following facts were proved or admitted:

(1.) The respondent Dicksee was the district surveyor for the district comprising the Victory Place school and the Paragon school.

(2.) The appellants were a firm of builders who had entered into contracts with the London County Council in their capacity as education authority for the county of London for the erection of certain new buildings and for the alteration of certain existing buildings at the public elementary school in Victory Place and for the enlargement of and alterations to existing buildings at the public elementary school known as the Paragon school.

(3.) The said schools were public elementary schools occupied by the London County Council as education authority for the county of London under and in pursuance of the Elementary Education Acts, 1870 to 1911.

(4.) Under the contract between the London County Council and the appellants in respect to the buildings at the Paragon school building work was commenced on or about October 8, 1912, by the appellants, but the appellants did not in pursuance of s. 145 of the London Building Act, 1894, give to the respondent Dicksee a building notice of such building work.

(5.) The work done at the Paragon school consisted in building on to the existing school buildings an additional wing as shewn upon certain plans which were produced at the hearing and in making certain internal communications and other alterations between the existing part of the school buildings and the new wing. It was argued by the appellants and denied by the respondents that the new wing was a new building as distinguished from an alteration to or enlargement of an existing building. The respondents in support of their contention relied (inter alia) on the facts that (i.) the new wing, which was three storeys in height, had no staircase, and (ii.) that the only access to any storey was through the existing building. In consequence of the view which the magistrate took of the construction of the Act of 1911 as expressed in his judgment hereto annexed he did not consider it necessary to decide and did not decide whether the building constructed at the Paragon school was a new building or an alteration of an existing building.

(6.) The building work at the Victory Place school consisted in constructing an entirely new school building and outbuildings on the site of the old school and was being carried out by the appellants under the contract in that behalf. Building work in regard to it was begun by the appellants on or about November 26, 1912, but no building notice as is required by s. 145 above mentioned was given to the respondent Dicksee of such building work. There were in addition to the construction of these new school buildings works of alteration to be carried out under the contract to the existing buildings of the Victory Place school, adapting them for temporary use during the erection of the new school buildings which were planned to occupy part of the site of the altered buildings. No building notice under s. 145 was given by the appellants to the respondent Dicksee in respect of this work of alteration, and the appellants pleaded guilty to the offence charged in respect of the last mentioned omission and were fined 40*s*. for that offence, and no questions of law were raised in regard to the propriety of the last mentioned conviction.

(7.) The whole of the work carried out by the appellants at each of the schools was in compliance with the building regulations made by the Board of Education in 1907 governing the planning and building of new buildings for public elementary schools. Detailed plans shewing the work to be done under each of the contracts at each of the schools had been before the commencement of the work submitted to and approved of by the Board of Education within the meaning of s. 3 of the Education (Administrative Provisions) Act, 1911, and the building work being carried out by the appellants at each of the schools was in strict compliance with the last mentioned plans.

(8.) Detailed plans prepared by the appellants shewing the works hereinbefore referred to were produced. It was also proved that the appellants on or about September 20, 1912, submitted to the respondent Dicksee pursuant to s. 13, sub-s. 5, of the London Building Act, 1894, plans (in duplicate) of the existing buildings at the Victory Place school, and the respondent Dicksee as district surveyor on October 2, 1912, certified the said plans in accordance with that sub-section. The original plan so certified was produced.

The appellants contended that upon the above facts and in view of s. 3 of the Education (Administrative Provisions) Act, 1911, the provisions of the London Building Act, 1894, and Acts amending the same dealing with the construction of new buildings, including the provisions of s. 145 of the London Building Act, 1894, were not applicable to the new building at the Paragon school or to the new buildings at the Victory Place school, and that the appellants were under no liability to give to the respondent Dicksee as such district surveyor as aforesaid a building notice as required by the last mentioned section.

The respondents contended that the offence charged in each of the informations had been committed by the appellants, that a building notice under s. 145 in respect of each of the buildings at the school premises was still required to be given notwithstanding the provisions of s. 3 of the Education (Administrative Provisions) Act, 1911, and the cases of *London County Council* v. *District Surveyors' Association and Willis* (1) and *Galbraith* v. *Dicksee* (2) were cited on behalf of the respondents in support of their said contention.

The magistrate adjourned the case until April 7, 1913, in order to consider the above contentions, and on that day determined the informations as above mentioned. He delivered a judgment setting forth his reasons for considering that the offences had been committed by the appellants.

The judgment of the magistrate was as follows:—

"In form the complainant upon these three summonses is Mr.

(1) [1909] 2 K. B. 138.

(2) (1910) 102 L. T. 890; 74 J. P. 348.

Dicksee, the district surveyor for a district of South London, and the defendants are a limited company—a firm of builders. In substance the complainants are the District Surveyors' Association, and the defendants the London County Council. In form the summonses ask for the conviction of, and the infliction of penalties upon, the builders for having failed to give the district surveyor building notices under the London Building Act, 1894. In substance the District Surveyors' Association asserts, and the London County Council denies, the right of such district surveyor to receive notice of, and to earn fees for, public duties performed upon the new school buildings of the London County Council schools to be erected within the area of his jurisdiction. The defendant builders are the building contractors employed by the London County Council to do certain works upon two of the London County Council schools within the district of the complainant, namely, (1.) to erect a new school building at the Victory Place school; (2.) to alter existing school buildings at the Victory Place school; (3.) to add a new wing to the existing school building at the Paragon school. In the view I take upon the whole case, it is now unnecessary to consider whether No. 3 is a new building or an alteration of an existing building. No building notices, within the London Building Act, 1894, were in fact given by the defendant builders to the district surveyor in respect of any of the above work. It is not perhaps strictly proved, but I think it is not now denied, that the fact is that the London County Council instructed the defendant builders not to give to the complainant any notices under the statute other than a notice as to No. 2—the alteration of the existing school buildings of the Victory Place school. That notice was not given by the defendant builders by reason of some mistake. In the view I take upon the whole case I need now consider nothing except the case of new buildings erected by the defendant builders. All the new buildings erected by the defendants were erected, or are to be erected, according to plans, which, under regulations relating to the payment of grants, are required to be, and have been, approved by the Board of Education.

"Having now mentioned all formal matters, I will proceed to deal with the question which arises as a matter of substance.

The District Surveyors' Association contends that the point is settled by authority—as to the right to notice by the case of *London County Council* v. *District Surveyors' Association and Willis* (1); as to the right to fees by the case of *Galbraith* v. *Dicksee.* (2) The London County Council does not dispute this proposition, but contends that, since the decision of these cases, the law has been altered by statute, and refers to the Education (Administrative Provisions) Act, 1911 (1 & 2 Geo. 5, c. 32), s. 3, and the whole point before me turns upon the proper construction of that section. It seems to me to be a very obscure section, but I will try and put into words the process by which I have arrived at my view of its interpretation. Slightly altering the order of the words of the first part of the section, it reads: 'The provisions of any by-laws with respect to new buildings made by any local authority under section 157 of the Public Health Act, 1875, as amended by any other Act (including the provisions as to the giving of notices and deposit of plans and sections) . . . . shall not apply in the case of any new buildings being school premises to be erected . . . . according to plans . . . . approved by the Board of Education.' The comment that I wish to make upon that part of the section is: that, whether the change be very sweeping or not, the words seem quite effective to free the Board of Education entirely from local by-laws throughout the country which assume to regulate the construction of new buildings. The section goes on to deal with Acts of Parliament, local Acts, and localities governed by local Acts, and in this connection with London, the whole of whose building legislation is now to be found in the London Building Act, 1894, and its companion statutes. 'And any provisions in any local Act dealing with the construction of new buildings . . . . shall not apply in the case of any new buildings being school premises to be erected . . . . according to plans . . . . approved by the Board of Education.' If it be true to say that the first part of the section in terms takes approved new school buildings out of the Public Health Act, 1875, it is equally true to say that the second part does not in terms take such buildings out of the London Building Act, 1894. The words may be wide enough to have that effect if the section is to be read: 'Any local Act dealing with the construction of any new buildings.' I shrink, however, from that far-reaching construction. Mr. Bodkin for the London County Council hardly, I think, contends for it, as he pleads guilty to the inadvertence of giving no notice of alterations, and a construction, which would free from all district surveyors' control approved new buildings, and yet would trammel approved alterations in old buildings, does not commend itself to my mind. The alternative then is to read the section: 'And in any local Act any provisions dealing with the construction of new buildings . . . . shall not apply' &c. If this be the true reading of the section, what does this do more than reiterate that which has been done by the London Building Act, 1894, itself, and by the cases decided under it, namely, allow the approved new buildings to be free from Part VI. of the London Building Act, 1894? It may be a lame conclusion to come to that a section which may have exceedingly far-reaching effects in the country with regard to approved new school buildings has no effect whatever in London with regard to the same matter. I prefer that construction to being driven to hold that the London County Council, as school builders, is free of the London Building Act, 1894, and of the district surveyors because of an obscure provision in an Act. I give it in its full title: 'An Act to make provision for the better administration by the central and local authorities in England and Wales of the enactments relating to education.' I am of opinion that Mr. Dicksee was entitled to his building notice in each of the three instances for which he has issued summonses, and I fix the penalties at forty shillings in each of the three cases and allow the complainant 15*l.* 15*s.* costs."

---

(1) [1909] 2 K. B. 138.

(2) 102 L. T. 890; 74 J. P. 348.

The question for the Court was whether in so convicting the appellants the magistrate came to a right determination in point of law, and, if not, what should be done in the premises.

Danckwerts, K.C. (*Bodkin* and *A. S. Comyns Carr* with him), for the appellants. Sect. 3 of the Education (Administrative Provisions) Act, 1911, was passed to alter the law laid down by *London County Council* v. *District Surveyors' Association and*

Willis (1) and followed in *Galbraith* v. *Dicksee* (2), where it was decided that a building notice under s. 145 of the London Building Act, 1894, must be given by the education authority of the county of London on commencing to erect a public elementary school. Sect. 3 of the Act of 1911 provides that by-laws made by local authorities under s. 157 of the Public Health Act, 1875, and by-laws made under local Acts with respect to new buildings shall not apply in the case of new buildings erected according to plans required to be approved by the Board of Education. Therefore as regards England generally building notices need not now be given to district surveyors when the building of public elementary schools is commenced. Why should any different law apply to London? Whether it does or not depends on the meaning to be given to the words "dealing with the construction of new buildings." No doubt Part VI. of the London Building Act, 1894, containing ss. 53 to 81 inclusive, is headed "Construction of Buildings"; but it does not follow, as the magistrate seems to think it does, that the words in s. 3 of the Act of 1911 contain any special reference to Part VI. or shew any intention to exclude other portions of the Act dealing with the construction of new buildings. For example, by s. 146 the district surveyor is to survey any building or work placed under his supervision and cause all by-laws to be duly observed; by s. 163 he is to notify the London County Council of any actual or probable contravention of the provisions of the Act of which he has notice or information or which he has discovered and with which he is not competent to deal. The whole of a district surveyor's duties are concerned with the construction of buildings. The building notice is the first step in the construction. The matters which by s. 145 are to be stated in the notice all relate to the construction. The only reasonable conclusion is that s. 145 is a provision in a local Act "dealing with the construction of new buildings" when the buildings in question are new buildings. This construction will bring London into conformity with the rest of England.

Ryde, K.C., and *Daldy*, for the respondents. It is a mistake to suppose that the duties of a district surveyor relate only to the construction of buildings. By s. 13, sub-s. 5, of the Act of 1894, if any person wants to alter or re-erect a building he must submit his plans to the district surveyor, who is to certify them for the purpose of making them evidence. By s. 138 every building or structure and every work done to, in, or upon any building or structure and all matters relating to the width and direction of streets, the general line of buildings in streets, the provision of open spaces about buildings, and the height of buildings shall be subject to the supervision of the district surveyor. By s. 150, where it appears from the building notice served on the district surveyor under the Act that it is proposed to erect any building or structure or to do any work to, in, or upon any building in contravention of the Act, the district surveyor is to serve on the builder or building owner a notice of objection. By s. 163 the district surveyor is to notify the London County Council of any actual or probable contravention of the Act in relation to matters and things not within his competency of which he has had notice or information or which he has discovered. Therefore his duties relate not only to the construction but also to the supervision of buildings. The building notice under s. 145 is to enable him to deal with either branch of his duties. The Board of Education have nothing to say to the width of streets. If they pass plans for a building, no doubt structurally it will be beyond reproach, but it may also encroach on the general line of buildings. The words "construction of new buildings" in s. 3 of the Act of 1911 mean "the mode of construction of new buildings": *Higgs and Hill* v. *Stepney Borough Council.* (1) In so far as the mode or actual plan or scheme of construction of a public elementary school is in question the giving of a building notice is excused, but for all the other purposes contemplated by the London Building Act, 1894, a building notice remains as necessary as it was before the Act of 1911 was passed.

---

(1) [1909] 2 K. B. 138.

(2) 102 L. T. 890; 74 J. P. 348.

Danckwerts, K.C., in reply.

CHANNELL J. If the words of an enactment are clear, all considerations of the policy of the Legislature are irrelevant: but if the language is not clear, then assistance may be sought from the object and purpose of the enactment.

---

(1) [1914] 1 K. B. 505.

The history of the legislation is this: After the passing of the London Building Act, 1894, certain enactments in the Education Acts authorized the Board of Education to approve plans of buildings for elementary schools and to refuse any grant to the promoters unless the plans had been approved. Then arose the question whether the obligation imposed by s. 145 of the London Building Act, 1894, to give notice of the proposed erection of a new school building to the district surveyor was excused by s. 201, sub-s. 5, of that Act on the ground that school buildings are "other public buildings belonging to or occupied for public purposes" by the County Council of London, who are the education authority for the county of London. That question came before the King's Bench Division in *London County Council* v. *District Surveyors' Association and Willis.* (1) Two points were there raised. The first point was that s. 201 is in terms expressed to exempt the buildings therein specified from the operation of Parts VI. and VII. of the Act, and that as s. 145 is neither in Part VI. nor in Part VII. the exemption did not cover the provisions of that section; therefore before the appellants in that case could successfully contend that s. 145 was abrogated as to a school, assuming it to be a public building occupied for public purposes, they had to establish that the whole object of s. 145 disappeared with the exemption from Parts VI. and VII. That point they failed to establish. The other question was whether a public elementary school was "a public building occupied for public purposes." On that point the Court gave no opinion. That decision affected all public elementary schools in London; but the rest of England, except places subject to local Acts, was governed by the provisions of the Public Health Act, 1875. In that state of things the Education (Administrative Provisions) Act, 1911, was passed. The Legislature was minded to exempt from the operation of by-laws made under the Public Health Act, 1875, and from the provisions of local Acts places affected by those by-laws and those provisions. With that view they passed s. 3 of the Act. A very important point to consider is whether any intention can be found to put schools outside London on any different footing from those inside London. No reason can be suggested for any such difference in treatment. On the other hand it is not unnatural to find somewhat different language used in the different portions of s. 3 which deal with schools inside and those outside London respectively. Therefore the mere fact that somewhat different language is used does not necessarily mean that different treatment is to be applied. The first portion of the section points clearly to s. 157 of the Public Health Act, 1875. It speaks of "by-laws made by any local authority . . . . with respect to new buildings (including provisions as to the giving of notices and deposit of plans and sections)." One of the difficulties in this case is that as regards areas outside London the deposit of plans and sections is expressly mentioned, while as to areas inside London the only provisions specified are those "dealing with the construction of new buildings." But a sufficient reason for this difference of expression is that in s. 157 of the Public Health Act, 1875, the construction or structure of new buildings and the deposit of plans and sections are dealt with as separate items. The urban authority may make by-laws with respect to (among other things) "the structure of walls foundations roofs and chimneys of new buildings . . . . And they may further provide for the observance of such by-laws by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings" &c. That being the reason why special reference is made to notices, plans, and sections in areas governed by the Public Health Act, 1875, I see no reason for drawing the inference that the absence of such a reference in the remaining part of s. 3 of the Act of 1911 indicates that a different order of things is to prevail in London and other places governed by local Acts. Then, guided by the fact that in areas under the Public Health Act, 1875, it is not necessary to give any building notice to any district surveyor when the building of a public elementary school is about to be begun, we have to consider the meaning of the words "any provisions in any local Act dealing with the construction of new buildings." Under the London Building Act, 1894, the district surveyor has many duties to perform. His principal duty relates to the construction, or, if there is any difference between the expressions, the mode of construction, of buildings. He has other incidental duties, as to prevent builders from encroaching on highways, to preserve the building line, and so on; but he is mainly concerned with the construction of buildings. That being so, the main object of s. 145 of the Act, if not its entire object, is that he should have such notice as would enable him to perform his duties in relation to the construction of buildings. In other words, it is a provision in a local Act "dealing with the construction of new buildings." The point may be taken that the notice is useful for other purposes as well; that it indicates the position or site of the new building and so enables the district surveyor to inspect it and see whether it encroaches on a highway; that it states the name and address of the builder; that it might shew the surveyor that the building was intended as a public elementary school and was being constructed upon plans already approved by the Board of Education with which he need not concern himself. If an Act contains separate and distinct provisions, one dealing expressly with the construction of new buildings and another dealing expressly with the giving of notices, no doubt an Act in terms abrogating the section dealing with construction would leave unaffected the section relating to plans. But when the later Act in general terms abrogates "any provision" in the earlier Act dealing with construction of new buildings, "any provision" means all provisions, and not any particular provision, dealing with construction. Then the question whether a given section has been abrogated or not depends upon whether it is a provision dealing with the construction of new buildings. I have come to the conclusion that Mr. Danckwerts is right in saying that in the main s. 145 of the London Building Act, 1894, is a section dealing with the construction of new buildings, and none the less so for the mere fact that incidentally it happens to be useful in other ways. I am guided to this conclusion by seeing no conceivable reason why one state of things should exist in places under the Public Health Act, 1875, and a different state of things in London and other places under local Acts, while I do see some reason for different language in the Act of 1911 intended to have the same operation, in that the Public Health Act, 1875, being one statute easily accessible to the draftsman, invited special reference to its actual words, while the provisions of numerous local Acts could only be referred to in general terms as "any provisions . . . . dealing with the construction of new buildings." For these reasons I think the appeal should be allowed.

---

(1) [1909] 2 K. B. 138.

SCRUTTON J. I agree, and have nothing to add.

BAILHACHE J. I agree, but should like to explain the difficulties I have felt during the argument. Sect. 3 of the Act of 1911 uses the words "any provisions in any local Act dealing with the construction of new buildings." Sect. 145 of the London Building Act, 1894, is a provision in a local Act. It provides for notice to be given when a building is about to be begun. Can that strictly be called a provision dealing with the construction of new buildings? That was the difficulty which pressed me. If "dealing with the construction of new buildings" means dealing with the mode of construction, then, in my view, s. 145 of the London Building Act would not be such a provision. If the phrase in the Education Act means dealing with the fact of construction, s. 145 of the London Building Act is such a provision. I have come to the conclusion that the phrase in the Education Act means dealing with the fact of construction, and consequently that the education authority need not give the notice.

Per Curiam. The case must go back to the magistrate for him to decide whether the building at the Paragon school was a new building.

Appeal allowed.

Solicitor for appellants: *Edward Tanner.*
Solicitors for respondents: *Hicklin, Washington & Pasmore.*

W. H. G.

TAYLOR *v.* MONK.

1914
March 4.

Gaming—Betting House—Using a House—Persons resorting thereto—Betting Act, 1853 (16 *&* 17 *Vict. c.* 119), *s.* 1.

By s. 1 of the Betting Act, 1853, no house shall be used for the purpose of the owner thereof, or any person using the same, or any person employed by such owner or person using the same, betting with persons resorting thereto. By s. 3 any person who, being the owner of any house or a person using the same, uses the same for the purpose aforesaid is liable to a penalty.

The appellant used a house in the following way:—He employed two servants to stand respectively one inside the house and the other outside, both close to the doorway, which was kept open. Persons passing along the street handed betting slips to the man outside, who, without moving from his position, handed them to the man inside, who subsequently sent them to the appellant at another address. The slips related to bets on horse races:—

Held, that there was evidence on which the appellant could properly be convicted of using the house for the purpose of betting with persons resorting thereto.

Case stated by the justices of Birmingham.

An information was laid by the respondent, a superintendent of police, for that on July 2, 4, 7, 8, 9, and 10, 1913, the appellant, being a person using a certain house numbered 88 in Branston Street, Birmingham, unlawfully did use the said house for the purpose of betting with persons resorting thereto on certain events and contingencies of and relating to certain horse races contrary to s. 1 of the Betting Act, 1853. (1)

---

(1) Betting Act, 1853 (16 & 17 Vict. c. 119), s. 1: "No house . . . . shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof betting with persons resorting thereto . . . . and every house . . . . opened, kept, or used for the purposes aforesaid, or any of them, is hereby declared to be a common nuisance and contrary to law."

Sect. 3: "Any person who, being the owner or occupier of any house . . . . or a person using the same, shall . . . . use the same for the purposes hereinbefore mentioned, or either of them . . . . shall, on summary conviction before any two justices of the peace, be liable to forfeit and pay such penalty, not exceeding 100*l.*, as shall be adjudged by such justices . . . ."

The justices convicted the appellant, but stated the following case:—

"The house, 88, Branston Street, is occupied by Eliza Ann Hughes, who lives there with her husband and children. It contains on the ground floor a front living room. The front door of the house is in the front room and opens directly on to the public footway of the street. This front door is the only entrance to the house. There are two steps to this door from the public footway. One of such steps is actually on the footway and the second step is in the doorway. On July 2, 1913, one Ernest Siviter was on the footway, just outside and at the side of the door, six inches from the doorstep. The door was open. Between 1.5 and 1.55 P.M. fifteen different men passing along the footway were seen to hand packets to Siviter while he stood in the position above mentioned. Siviter in turn handed the packets immediately he received them to one Richard Markland, who stood inside the house and close to the doorway. Siviter was able to do this without moving from his position outside the door. On the 4th, 7th, 8th, 9th and 10th days of July, 1913, other packets were received by Siviter in the same way and handed by him to Markland. On some of the occasions Markland could be seen from the street. On one occasion Markland put his head out of the doorway, on some occasions the hands of the two men were seen to meet, and on other occasions Markland was not seen at all. On July 10, 1913, at 2.3 P.M., the police, having obtained a search warrant, went to the house. They saw Markland and Siviter in the house, but the door was locked. When they were called upon to open the door Markland and Siviter fled upstairs and barricaded themselves in an attic. Entrance to the house was forced by the police, who fetched Markland and Siviter downstairs into the front room. In that room was a leather bag containing a canvas bag in which there were 2*l.* 13*s.* in money and twenty-two packets relating to bets on horses running that day at Pontefract. Five other empty canvas bags were on the table together with two time checks. These checks were used to mark the time at which the packets were received. Evidence was given that there were no other paraphernalia relating to betting, and nothing in the house like a betting office, and no paying-out book. Markland had on him 10*l.* in gold, silver, and copper coins which he said was paying-out money. Later on the same day the appellant was seen by the police and he was told that he would be reported for using the house for the purpose of receiving bets. He said 'I can't understand it. The bets are taken in the street and put in the house.' The appellant admitted that the packets after being taken by Markland and Siviter were sent to him (the appellant) at another address. The appellant further said, referring to Siviter, 'That is the man I employ to take in the streets. The other one I employ to look after the bets when they are in the house. They have to be taken to some house. We can't do our business all on the streets.' In the presence of the appellant, Eliza Ann Hughes said: 'Mr. Taylor does not pay my rent, but what money he does give me I put on the backs of my children.' No evidence was given of the appellant having been seen at any time at the house.

"It was contended on the part of the appellant:

"(1.) That there was no evidence of the appellant using the said house for the purpose of betting or otherwise.

"(2.) That no evidence had been given of any person resorting to the house with appellant.

"(3.) That there was no evidence of the use of the house for the purpose of betting by any one, but that the bets were made, if at all, in the street, and not even there by the appellant.

"(4.) That the offence, if any, was that of street betting by Siviter.

"(5.) That the act, if any, of betting was completed when Siviter received the bets outside the house.

"In support of these contentions the case of *Powell* v. *Kempton Park Racecourse Co.* (1) and many other cases were referred to.

"On the evidence we found as a fact that the house was used by the appellant for the purpose of betting with persons resorting thereto. We therefore convicted the appellant and imposed a fine of 50*l.*, and 13*s.* costs, and in default of payment we ordered him to be imprisoned for three calendar months.

"If the Court is of opinion that on the facts stated we were right in convicting the appellant, then the conviction is to stand. If we were wrong, then the conviction is to be quashed."

---

(1) [1897] 2 Q. B. 242; [1899] A. C. 143.

Danckwerts, K.C., and *Maddocks*, for the appellant. The offence charged is that of using this house for the purpose of betting with persons resorting thereto. The appellant was not charged with using the house for the purpose of receiving deposits on bets, which is a separate and distinct offence: *Bond* v. *Plumb*. (1) There is no evidence that the house was used for the purpose of betting with persons resorting thereto. The intention of the appellant was that the persons with whom bets were made should not resort to the house. Then in order to support the conviction actual physical resorting must be proved: *Reg.* v. *Brown*. (2) There may in this case be evidence of the offence of betting in the street by Siviter and of aiding and abetting on the part of the appellant, but that is not the offence charged.

Secondly, there is no evidence that the appellant used the house. The words alleged to have been used by Mrs. Hughes in his presence were not evidence of the facts she stated. They ought not to have been considered except with reference to the conduct of the appellant when the words were said, and as to that no facts are stated.

J. G. Hurst, for the respondent. There is ample evidence of the user by the appellant of this house for the purpose of betting with persons resorting thereto. This is an attempt to evade the Act depending for its success upon the fallacy that there can be no resorting to a house without passing the threshold. [*Davis* v. *Stephenson* (3), *Powell* v. *Kempton Park Racecourse Co.* (4), and *Stoddart* v. *Hawke* (5) were also cited.]

CHANNELL J. The only question for us is whether there was evidence to support the decision of the justices. To establish the offence it was necessary to prove two things; first that the appellant was using the house in question for a particular

(1) [1894] 1 Q. B. 169.
(2) [1895] 1 Q. B. 119.
(3) (1890) 24 Q. B. D. 529.
(4) [1899] A. C. 143.
(5) [1902] 1 K. B. 353.

purpose, and secondly that the purpose was for betting with persons resorting thereto. These are both questions of fact, and if there was any evidence on which the justices could find them in favour of the respondent, we have no power to interfere with the findings. In my view there was evidence to support each finding. The user of the house was not by the appellant himself but by his two servants. This was by the permission of Mrs. Hughes, who seems to have been the owner. I think there was sufficient evidence of that apart from what Mrs. Hughes is stated to have said in presence of the appellant, which could only have been made evidence of the fact of the user by the conduct of the appellant in whose presence the words were said, and as to that no facts are stated. But it is not necessary to rely upon what Mrs. Hughes said, for apart from that there was in my opinion sufficient evidence of user.

The real difficulty is as to persons resorting to the house. There must be a physical resorting by persons. Merely writing letters to an address is not sufficient to constitute resorting. On the other hand it is not necessary that the person resorting should actually effect an entrance into the house. If he knocks at the door and an inmate of the house comes and answers the summons; or if he gives a signal and the inmate appears in response to the signal; or if he appears at intervals and the inmate on the look out for him simultaneously appears at the door; in all these cases there would be evidence of resorting although the person did not actually enter the house. The question is largely one of degree. In the present case there was obviously an arrangement by which Siviter received the betting slips with one hand outside the house and the other hand in communication with a person inside. If the appellant had made use of a landing net or other mechanical apparatus which received the slips from persons coming with the intention of delivering them, and then conveyed the slips to himself or his servant inside the house, that would in my opinion have constituted a user of the house for the purpose of betting with persons resorting thereto. I do not see how such a case can be distinguished from the present. The same thing has been effected by an ingenious contrivance where two men take the place of the mechanical apparatus I have suggested. Therefore in my opinion there was evidence of a user by the appellant of this house for the purpose of betting with persons resorting thereto, and the appeal must be dismissed.

SCRUTTON and BAILHACHE JJ. concurred.

Appeal dismissed.

Solicitors for appellant: *Judge & Priestley, for Philip Baker, Birmingham.*

Solicitor for respondent: *J. Ernest Hill, Birmingham.*

W. H. G.

1914
March 3.

ASSOCIATED NEWSPAPERS LIMITED AND OTHERS, APPELLANTS v. MAYOR, ALDERMEN AND COMMONS OF THE CITY OF LONDON, RESPONDENTS (No. 2).

Rates—Exemption from Taxes and Assessments—City of London—General Rate—Consolidated Rate—Police Rate—7 Geo. 3, c. 37, s. 51—City of London Police Act, 1839 (2 *&* 3 *Vict. c. xciv.)—City of London Sewers Act,* 1848 (11 *&* 12 *Vict. c. clxiii.)—City of London (Central Criminal Court House) Act,* 1904 (4 *Edw.* 7, *c. xciii.)—City of London (Union of Parishes) Act,* 1907 (7 *Edw.* 7, *c. cxl.*).

By s. 51 of the statute 7 Geo. 3, c. 37, it was provided that certain lands reclaimed from the river Thames should vest in the adjoining owners "free from all taxes and assessments whatsoever."

Before the passing of that Act there had been passed an Act of 10 Geo. 2, c. 22, for better regulating the nightly watch and beadles within the city of London, which required the Corporation of that City to appoint watchmen and beadles for each of the City wards, and to give directions as to their arming, duties, and wages; and to order and direct the attendance of constables every night at each ward; and for the better raising and levying of moneys for paying the wages of the watchmen and beadles and other charges incident thereto, to direct the alderman and common councilmen of each ward to make an equal rate and assessment upon all persons who should inhabit, hold, occupy, or enjoy any land, house, shop, warehouse, or other tenement within their respective wards.

Before the City of London Police Act, 1839, was passed there were acting within the City night watchmen paid out of the watch rate, 120 policemen paid out of the City's cash and not out of rates, and constables chosen from the wards and not paid.

The City of London Police Act, 1839, was passed to repeal the Act of 10 Geo. 2, c. 22, in order to render still more effective a certain system of police established instead of a nightly watch. By s. 58 it was enacted that a just and equal pound rate should be made upon every person who should inhabit any house within the several wards or within any precinct or place within the boundaries of such wards or adjoining thereto whether such person should then be liable in respect of such house to be assessed to the relief of the poor, or should not be liable to be assessed to the relief of the poor in respect thereof by reason of such house being situated in any precinct or extra-parochial place.

Both before and after the statute of 7 Geo. 3, c. 37, numerous Acts had been passed relating to the paving, cleansing, and lighting of streets in the city of London.

By s. 168 of the City of London Sewers Act, 1848, there was established a rate to be called the consolidated rate for making, maintaining, keeping in repair, paving, lighting, sweeping, cleansing, and watering the streets, and for making improvements and constructing, altering, repairing, and cleansing the sewers within the City, and for otherwise maintaining effectually the wholesome sewerage and drainage of the City, defraying wages and all other incidental costs and expenses attending the execution of the powers thereby given. By s. 169 of the Act the rate was to be made upon every person who should inhabit, hold, occupy, possess, or enjoy any house or building within the City whether such person should then be liable in respect of such house or building to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of any such house or building being situated in any precinct or extra-parochial place or otherwise.

By the City of London (Union of Parishes) Act, 1907, s. 15, certain rates including the police rate and the consolidated rate were to be assessed, made, levied, and collected as one rate to be termed the general rate.

In a general rate made by the respondents as overseers of the parish of the city of London the appellants, who were occupiers of land and hereditaments reclaimed under the statute 7 Geo. 3, c. 37, as aforesaid, were rated thereto in respect of those lands. The general rate was made for (1.) expenses of paving, cleansing, lighting, improvements, and sanitary charges, and (2.) expenses in respect of police. It being admitted for the purposes of this case that the general rate might be analysed into its component parts:—

Held, as to so much of the rate as was made for the expenses of paving, cleaning, lighting, &c., that the appellants were liable:

Sion College v. *London Corporation* [1901] 1 K. B. 617 followed;

but *held*, as to so much of the rate as was made for expenses in respect of police, that, this being a rate for purposes existing at the date of the statute 7 Geo. 3, c. 37, the premises in question were exempted and the appellants were not liable.

Case stated under s. 11 of the Quarter Sessions Act, 1848.

The appellants duly gave notice of appeal to the general quarter sessions of the peace for the city of London against a general

1914

Associated Newspapers Limited v. City of London Corporation (No. 2).

rate made by the respondents on April 6, 1911. Afterwards by consent of the appellants and respondents and by order of Lush J. the following special case was stated for the opinion of the King's Bench Division of the High Court of Justice, the parties hereto agreeing that a judgment in conformity with the decision of the Court, and for such costs as the said Court should adjudge, should be entered on motion by either party at the sessions next or next but one after such decision should have been given.

In a "general rate" made by the respondents on April 6, 1911, the several appellants were rated thereto in respect of the several hereditaments occupied by them within the area of land reclaimed under statute 7 Geo. 3, c. 37, as hereinafter appears. The appellants jointly gave a notice of appeal against the rate.

The facts relating to the several hereditaments, so far as material to this case, and the considerations of law affecting the questions raised herein for the opinion of the Court were the same as far as each of the appellants is concerned. It was therefore agreed between the parties for the sake of convenience to take as a specimen case for the purposes of stating this special case and for the purposes of argument thereon the hereditament numbered, described, and assessed in the rate as follows:—

GENERAL RATE.

No. of Assessment.	Name of Occupier.	Owner.	Name or Situation of Property.		Description of Property.	Gross Value.	Rateable Value.	Amount of Rate at 9½*d.* in the £.	*Note.*—Amount claimed 9½*d.* in the £ being less $\frac{3}{16}$*d.* for Sewerage and Drainage and $\frac{3}{16}$*d.* for Ward Expenses.
			Street.	No. or Name of House.					
1.	2.	3.	5.	6.	7.	8.	9.	25.	26.
						£	£	£ *s.* *d.*	£ *s.* *d.*
12,734	Various.	City and West End Properties Company, Limited.	Bridge House (part), 181, Queen Victoria Street.		Shops and Offices that part included within the area of land reclaimed under 7 George 3, c. 37.	724	604	23 18 2	22 19 3½

The hereditament so numbered, described, and assessed is hereafter referred to as "the said hereditament." But it was

1914

ASSOCIATED NEWSPAPERS LIMITED *v.* CITY OF LONDON CORPORATION (No. 2).

agreed that the decision of the Court upon the questions raised in the special case should apply to all the several appellants and to all the several hereditaments which were all to be deemed to be the subject-matter of the case.

The said hereditament is situated in an area of land reclaimed from the river Thames under the powers granted for that purpose by 7 Geo. 3, c. 37, s. 51 of which is as follows: "And be it further enacted, that the ground and soil of the said river so to be inclosed and embanked, in the front of every such respective wharf or ground (and which shall be bounded on the east and west sides thereof by straight lines running, at right angles, to and upon the said intended front line) shall vest, and the same is hereby vested in the owner or owners, proprietor or proprietors, of such adjoining wharf or ground, according to his, her, or their respective estates, trusts, or interests therein, free from all taxes and assessments whatsoever."

The said hereditament is a portion of the ground and soil so vested by the statute 7 Geo. 3, c. 37, and the owners thereof, the City and West End Properties Company, Limited, are the successors in title of the persons in whom such portion of the ground and soil was originally vested.

The "general rate" appealed against was made to raise moneys required by the respondents for the following purposes, namely:—

(1.) Expenses of paving, cleansing, lighting, improvements, and sanitary charges other than those of sewerage or drainage at the rate of $5\frac{3}{16}d.$ in the pound.

(2.) Expenses under the City of London (Central Criminal Court House) Act, 1904, at the rate of $\frac{6}{16}d.$ in the pound.

(3.) Expenses in respect of police at the rate of $3\frac{7}{16}d.$ in the pound.

(4.) Other expenses of Common Council not payable out of the poor rate at the rate of $\frac{2}{16}d.$ in the pound.

The above enumeration of purposes is taken from the back of the demand note for the rate. A copy of this demand note, which was to form part of the case, will be found in the appendix to this report.

As regards police expenses, before the passing of the statute

1914

ASSOCIATED NEWSPAPERS LIMITED v. CITY OF LONDON CORPORATION (No. 2).

7 Geo. 3, c. 37, there had been passed an Act of 10 Geo. 2, c. 22 (1), for better regulating the nightly watch and beadles within the city of London and the liberties thereof. By this Act the Mayor, Aldermen, and Commons of the City in Common Council assembled were required to order and appoint what number of watchmen and beadles they should judge necessary and proper to be kept within each of the City wards; to direct how they ought to be armed, how long they were to watch, and what wages should be given them for their attendance; to order and direct what number of constables should attend every night at each ward; to make such other orders as the nature of each service should seem to require; and, for the better raising and levying of moneys for paying the wages of the said watchmen and beadles and other charge incident thereto, to direct the alderman, deputy, and common councilmen of each ward to make an equal rate and assessment upon all persons who should inhabit, hold, occupy, or enjoy any land, house, shop, warehouse, or other tenement within their respective wards.

Before the City of London Police Act, 1839, was passed there were acting within the City

(1.) Watchmen appointed by the ward authorities who did duty at night and were paid by the ward out of the watch rate;

(2.) 120 policemen regulated by the aldermen and paid for out of the City's cash and not out of rates as follows:—2 marshals, 6 marshalsmen, 4 police officers in attendance at the justice rooms, 2 attendants at the Mansion House to look after vagrants, 1 attendant at the justice room, 6 men—one at each of the 6 stations, 1 superintendent of police acting under a City marshal who acted as principal of the day police, 3 inspectors, 10 sergeants, and 85 police constables; and

(3.) Constables elected at wardmotes. These were chosen from the wards and were not paid. They had to sit up by night in the watch houses to receive charges from the watchmen. They were allowed, however, to serve by substitutes, whom the constables paid, there being no charge on the rate or on the City's cash.

The City of London Police Act, 1839 (2), was passed to repeal the Act of 10 Geo. 2, c. 22, in order to render still more effective a certain system of police which had been established instead of a certain nightly watch. By s. 58 of this Act a just and equal pound rate was to be made upon every person who should inhabit, hold, occupy, possess, or enjoy any house within the several wards, or within any precinct or place within the boundaries of such wards or adjoining thereto, and not included within the limits of the Metropolitan Police district, whether such person should be then liable in respect of such house to be assessed to the relief of the poor, or should be not liable to be assessed to the relief of the poor in respect thereof by reason of such house being situated in any precinct or extra-parochial place.

---

(1) See Appendix, post, p. 836.

(2) See Appendix, post, p. 837.

With regard to the expenses of paving, cleansing, lighting, &c., the following Acts relating to the paving, cleansing, and lighting of streets in the city of London had been passed before the Act of 7 Geo. 3, c. 37, namely, 14 Car. 2, c. 2; 19 Car. 2, c. 3; 22 & 23 Car. 2, c. 17; 2 W. & M. c. 8; 7 Anne, c. 9; 9 Geo. 2, c. 20; 10 Geo. 2, c. 22; 17 Geo. 2, c. 29; 33 Geo. 2, c. 30; 6 Geo. 3, c. 26. The following Acts for similar purposes were passed after 7 Geo. 3, c. 37, namely, 8 Geo. 3, c. 21; 11 Geo. 3, c. 29; 33 Geo. 3, c. 75; 4 Geo. 4, c. cxiv.; and the City of London Sewers Act, 1848, amended by the City of London Sewers Act, 1851, and the City of London Sewers Act, 1897.

By s. 168 of the City of London Sewers Act, 1848 (1), rates were to be made for the purposes of the Act, including a rate to be called the consolidated rate, for the purpose of making, maintaining, paving, lighting, sweeping, cleansing, and watering the streets, and making improvements in the City, and of constructing, altering, repairing, and cleansing the sewers within the City, and for otherwise maintaining effectually the wholesome sewerage and drainage of the City. By s. 169 every such rate was to be made upon every person who should inhabit, hold, occupy, possess, or enjoy any house or building within the City, or partly within and partly without the City (whether such person should then be liable in respect of such house or building to be assessed to the relief of the poor, or should be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situate in any precinct or extra-parochial place or otherwise), according to the full net annual value thereof respectively.

---

(1) See Appendix, post, p. 839.

With regard to the expenses under the City of London (Central Criminal Court House) Act, 1904, by s. 3 of that Act the expenses of the provision and erection of the court house were payable by means of money borrowed upon the security of the consolidated rate, and the expenses and cost were to be deemed to be costs and expenses attending the execution of the powers given by the City of London Sewers Acts, 1848, 1851, and 1897.

By the City of London (Union of Parishes) Act, 1907, s. 15, the sewer rate, consolidated rate, and police rate, and another rate known as the "trophy tax," were to be assessed, made, levied, and collected together by the Common Council as one rate to be termed the general rate.

The appellants contended that by virtue of the statute 7 Geo. 3, c. 37, they were not rateable to the general rate; and that, if rateable to any part of that rate, they were not liable to pay the amount applicable for police purposes.

The respondents contended (1.) that the statute 7 Geo. 3, c. 37, only exempted the premises in question from taxes and assessments in existence at the date of that statute, and that the consolidated rate imposed by the City of London Sewers Act, 1848, being a substantially new rate, and being intended by that Act to be imposed upon the premises, did not come within the exemption; and (2.) that the police rate was a substantially new rate, and therefore not within the exemption.

The questions for the Court were:—

(1.) Whether the appellants were liable to pay the sums assessed upon them by the general rate; (2.) whether they were liable to pay such portion thereof as was made to raise any sum required for police purposes.

Macmorran, K.C., and *Konstam*, for the appellants. The general rate may be analysed: *Islington Borough Council* v. *London School Board* (1); *Ash* v. *Nicholl.* (2)

[This was admitted by counsel for the respondents.]

---

(1) [1903] 2 K. B. 354.

(2) [1905] 1 K. B. 139.

On analysis it is found to consist of the consolidated rate created by the City of London Sewers Act, 1848, and the police rate created by the City of London Police Act, 1839.

The questions are (1.) whether these rates are substantially new rates imposed for the first time since the passing of 7 Geo. 3, c. 37, or merely new means of supplying funds for purposes existing at that date: *Sion College* v. *London Corporation* (1); and (2.), assuming that the City of London Sewers Act, 1848, and the City of London Police Act, 1839, merely provided new machinery for old purposes, whether those Acts or either of them purport to impose the respective assessments on the premises in question notwithstanding the exemption they enjoy under the Act of George III.

It is clear that s. 168 of the Act of 1848 creating the consolidated rate merely imposed a rate for old purposes in existence before 7 Geo. 3. The respondents contend that as to this rate the case is concluded by *Sion College* v. *London Corporation* (1); the answer is that when that case was decided the consolidated rate included a rate for education purposes which was certainly a new assessment. The consolidated rate has now been relieved of education expenses with the result that it has lost the character of a new imposition. That case therefore does not hurt the appellants.

As to whether the Act of 1848 shews an intention to impose the consolidated rate on the premises in question, the charging section is s. 169, which imposes the rate on persons liable to poor rate or not liable by reason of their property "being situate in any precinct or extra-parochial place or otherwise." Those words do not include an occupier of land specially exempted by statute: *London Corporation* v. *Netherlands Steamboat Co.* (2)

Next as to the police rate, this is even more than the consolidated rate a rate for purposes in existence in 1766. The maintenance of law and order in the City was the object of the statute 10 Geo. 2, c. 22. The ward rate established under that Act imposed a burden on the ratepayers which was no doubt less onerous than that imposed by the City of London Police Act,

(1) [1901] 1 K. B. 617.

(2) [1906] A. C. 263.

1839; but the amount of the rate does not alter the purpose for which it is raised.

The premises therefore come prima facie within the exemption in 7 Geo. 3, c. 37. The charging section, s. 58, of the Act of 1839 is less wide in its terms than s. 168 of the City of London Sewers Act, 1848, in that the words "or otherwise" do not appear. It follows that *London Corporation* v. *Netherlands Steamboat Co.* (1), being in favour of the appellants as to the consolidated rate, is still more so as to the police rate.

Danckwerts, K.C., *Ryde, K.C.*, and *Boydell Houghton*, for the respondents. As to the consolidated rate this case is concluded by the decision of the Court of Appeal in *Sion College* v. *London Corporation.* (2) It is plain from the judgments in that case that the Court was dealing with the consolidated rate as originally created in 1848 and not merely as it was constituted or composed in the year 1900. If the Court had intended to decide no more than that the rate including, and because it included, education expenses was a new rate, how comes it that no member of the Court mentions those expenses? On the contrary Romer L.J. does mention "the consolidated rate established under the Act of 1848."

The police rate is a new rate. No one who compared the present system of police with that existing at the passing of the City of London Police Act, 1839, could come to any other conclusion. A rate may be a new rate within the principle of *Sion College* v. *London Corporation* (2) although it embraces some things incident to earlier rates. [*Associated Newspapers Limited* v. *London Corporation* (No. 1) (3) was also referred to.]

Konstam in reply.

CHANNELL J. This case, by the admission of counsel for the respondents, raises two questions—(1.) whether these premises are exempt from consolidated rate, and (2.) whether they are exempt from police rate. Both these rates are now collected as what is called a general rate. If the general rate was a rate upon which several charges were laid, it might be that the principle of *Associated Newspapers Limited* v. *London Corporation* No. 1) (1) would apply; the general rate would have to be regarded as a whole, and if it turned out to be an old rate the premises would be exempt, while if it was a new rate they would be liable. But Mr. Danckwerts has admitted that this case may be dealt with as if the consolidated rate and the police rate were merely joined together for purposes of collection and the question as to each of them might be considered separately.

---

(1) [1906] A. C. 263.

(2) [1901] 1 K. B. 617.

(3) [1914] 2 K. B. 603.

That being so, as to the consolidated rate I have come to the clear conclusion that the decision of the Court of Appeal in *Sion College* v. *London Corporation* (2) covers this case. The point was taken that the consolidated rate now is not the same as it was when that case was decided; and there are some grounds for this contention, in that the education rate, which at that date formed a large proportion of the consolidated rate, is now charged upon the poor rate. It is contended that, education expenses having ceased to be part of it, the consolidated rate has relapsed into an old rate, i.e., a rate for purposes existing at the date of 7 Geo. 3, and has ceased to be a new rate as it was held to be in *Sion College* v. *London Corporation*. (2) But in my view when that case is carefully examined it appears that the Court of Appeal held the consolidated rate as established under the City of London Sewers Act, 1848, to be a new rate and therefore outside the exemption of the Act of George III. without special regard to the education expenses forming part of the rate. Romer L.J. in giving judgment said (3): "We have, therefore, to consider whether the consolidated rate established under the Act of 1848 was substantially a new assessment. I am of opinion that we cannot on the facts avoid coming to a conclusion that it is so." That is not in any way inconsistent with the judgments of A. L. Smith M.R. or Collins L.J. The Master of the Rolls said (4): "I cannot look at the wide purposes of the consolidated rate without seeing that it was substantially a new rate"; and Collins L.J. said (5): "It seems to me, looking at the numerous

(1) [1914] 2 K. B. 603.
(2) [1901] 1 K. B. 617.
(3) [1901] 1 K. B. at p. 623.
(4) Ibid. at pp. 621, 622.
(5) Ibid. at p. 622.

subject-matters embraced in that rate,"—i.e., the consolidated rate —" which were not known when the earlier Act came into existence, the inference is that the consolidated rate is a new rate, and not the less so because it embraces some things incident to the earlier rates." The argument thus answered was that some of the purposes in the consolidated rate were purposes of old standing for which taxation existed at the date of 7 Geo. 3. If the Court were dealing merely with the question whether the consolidated rate as then constituted was a new rate, it is almost inconceivable that none of the three judges should have pointed to the education expenses as conclusive. Therefore I think the Court were all of one mind and their decision is distinctly and clearly expressed by Romer L.J. If so it is expressly in point in the present case so far as the consolidated rate is concerned.

The police rate stands upon a somewhat different footing. By the Act of 1839 and subsequent Acts a new police was introduced into the city of London and other places. If the present state of things is compared with that described as existing before the Act of 1839 the one is found to differ as widely as possible from the other. In old days there was extremely inefficient machinery costing comparatively little intended for a particular purpose; nowadays there is new machinery efficient and expensive demanding a large rate instead of a very small one. But the purpose is the same. If so, *Sion College* v. *London Corporation* (1) decides that the taxation is not new. Increased taxation for an old purpose is not new, but old, taxation. Taxation grows, but if its purpose is old the taxation is old. Accordingly I can see nothing to make the police rate a rate for a purpose different from the old ward rate which existed at the date of 7 Geo. 3. The mere fact that it is levied over a different area does not strike me as important. It is now levied all over the City and all the wards pay on a basis of equality. But the purpose of the rate, protection of the City, is the same now as it was then. It is said that the Police Acts give power to the police which the old watchmen did not possess; new offences have also been created and some of the police expenses are attributable to these new enactments. But they all have the same purpose, the preservation of order in the City. If the purpose of the rate is the test this is an old rate although increased greatly in amount.

---

(1) [1901] 1 K. B. 617.

On these grounds I think the police rate is covered by the exemption. The result will be judgment for the appellants on this part of the case and for the respondents on the other.

Scrutton J. Certain lands reclaimed from the river Thames in 1766 were declared by statute to be free from all taxes and assessments whatsoever. Under an Act of 1907 a general rate was levied upon those lands for certain purposes mentioned in the statute. But for the admission of Mr. Danckwerts that it is open to dissect that general rate and look at the items composing it I should have been disposed to think with Channell J. that the general rate was one and not to be split up and that the ruling of the Court of Appeal in *Sion College* v. *London Corporation* (1) would apply to it. But Mr. Danckwerts has admitted that it is possible to look at the ingredients making up the general rate. That being so, there is a consolidated rate with two minor items, expenses of the Central Criminal Court and other expenses of the Common Council. As to that I entirely agree that this Court is bound by the decision in *Sion College* v. *London Corporation* (1) and that the premises in question are liable to pay that rate.

The other question is in regard to police expenses. I have considerable doubt on that matter. On the one hand the old rate paid for the maintenance of constables at night in a ward and levied on the ward may be said to be a very different rate from that established by the Act of 1839 for a day and night constabulary throughout the entire City. On the other hand the purpose for which the rate was paid was the maintenance of law and order in the City. My learned brethren have formed a clear opinion on this point. I do not desire to dissent from their judgment. Up to the present I have not come to a conclusion upon this question. With the rest of the judgment I agree.

(1) [1901] 1 K. B. 617.

1914

ASSOCIATED NEWSPAPERS LIMITED *v.* CITY OF LONDON CORPORATION (No. 2).

BAILHACHE J. I agree with the opinion of Channell J. and have nothing to add.

Appeal allowed.

Solicitor for appellants: *William E. Hart.*

Solicitor for respondents: *Sir Homewood Crawford.*

APPENDIX.

All Cheques should be drawn to the order of the CORPORATION OF LONDON, and crossed "BANK OF ENGLAND.—Not Negotiable."

PRINTED OFFICIAL RECEIPTS ONLY CAN BE RECOGNISED.

DEMAND NOTE. Assessment No. 12734

POOR RATE AND GENERAL RATE.

THE CITY OF LONDON.

Messrs. The City and West End Properties Co., Ltd.

Premises:—Bridge House (part), 181, Queen Victoria Street, Shops and Offices: that part included within the area of land reclaimed under 7 Geo. 3, c. 37. Rateable Value £604.

THE COURT OF COMMON COUNCIL demand payment of a POOR RATE and a GENERAL RATE, made the 6th day of April, 1911, to meet expenses which will be incurred on or before the 30th day of September next, and of the arrears of former Rates now due from you as follows:—

	£	s.	d.	£	s.	d.
POOR RATE at 1*s.* 9⅞*d.* in the £ ..				55	1	0½
Arrears of former Rate						
GENERAL RATE at 9⅛*d.* in the £ ...				22	19	3½
Arrears of former Rate.						
TOTAL AMOUNT OF THE ABOVE RATES				£78	0	4

Reduced amount of Poor Rate payable by Owner provided it be paid within the time prescribed by Section 5 of the Poor Rate Assessment and Collection Act, 1869, £ (this applies *only* to property not exceeding the value of £20 for which a compounding agreement has been entered into).

The above amount may be paid in Two equal Instalments, the first being due as soon as made, and the second on the 1st July.

FOR PARTICULARS OF THESE RATES SEE OTHER SIDE.

THE TOWN CLERK,

VALUATION AND RATING DEPARTMENT, GUILDHALL, E.C.

Rates (accompanied by this Demand Note) should be remitted to the above by post, or paid at the GUILDHALL at any time during office hours.

Office Hours .. 10 to 5
(Saturdays .. 10 to 1)

ALL EMPTY HOUSES ARE LIABLE FOR HALF GENERAL RATE ONLY.

PARTICULARS OF RATES.

Purposes for which the Rates mentioned on the other side were made; estimated sum required to be raised for each purpose; and approximate amount in the £ levied for each purpose (including, as far as practicable, the proportionate amount in the £ to cover estimated costs of, and loss in, collection):—

		Sum required.	Amount in the £, including Allowance for costs of, and loss in, collection.	
POOR RATE.		£	s.	d.
* Relief of the Poor and other expenses of the Guardians of the City of London Union		167,844		
* General County Purposes of the London County Council		420,145	1	$6\frac{4}{16}$
* Equalisation Charge under the London (Equalisation of Rates) Act, 1894 (see Note below)		66,500	0	3
Expenses under the Lunacy Acts and Expenses of the Offices of Coroner and Clerk of the Peace		3,633		
Expenses of the Common Council as Overseers	£ 11,383			
Expenses of the Assessment Committee	2,000			
Costs of Collection	—			
	13,383			
Less Surplus ..	6,530			
		6,853		
TOTAL ..		664,975	1	$9\frac{7}{8}$
GENERAL RATE.				
Expenses of Paving, Cleansing, Lighting, Improvements and Sanitary Charges other than those of Sewerage and Drainage		128,381	0	$5\frac{3}{16}$
Less Surplus		13,117		
		115,264		
Expenses of Sewerage and Drainage ..		4,036		
Expenses under the City of London (Central Criminal Court House) Act, 1904		7,250	0	$0\frac{6}{16}$
Expenses under the Unemployed Workmen Act, 1905		Nil	Nil	
Expenses in respect of Police		75,008	0	$3\frac{7}{16}$
Trophy Tax		Nil	Nil	
Ward Expenses		3,800		
Costs of Collection		Nil	Nil	
Other Expenses of the Common Council not payable out of the Poor Rate ..		2,667	0	$0\frac{2}{16}$
		208,025	0	$9\frac{1}{8}$
TOTAL		£873,000	2	7

* The Corporation has no control over the expenditure of these amounts.

NOTE AS TO THE EQUALISATION CHARGE:—

The contribution from the Parish of the City of London to the Equalisation Fund authorised by the London (Equalisation of Rates) Act, 1894, is approximately 66,500*l.* The amount of the Rate hereby demanded is consequently more, to the extent of about 3*d.* in the £, than it otherwise would have been.

The Act of 10 Geo. 2, c. 22, was intituled An Act for the better regulating the nightly watch and bedels within the city of London, and liberties thereof; and for making more effectual the laws now in being, for paving and cleansing the streets and sewers in and about the said City. It recited that the well ordering and regulating a watch in the night time within the several wards in the city of London was of very great importance for the preservation of the persons and properties of the inhabitants thereof, and very necessary to prevent fires, murders, burglaries, robberies, and other outrages and disorders; and that by the laws then in being no effectual provision was made for the establishing, ordering, or well governing of such a nightly watch, or for levying and collecting any sums of money for defraying the necessary charges thereof, and of the bedels who should be appointed to take care of the same; for the effecting of which good purposes for the future, and to the end that a due application and just account might be had and taken of the money which should thereafter be levied and collected by virtue of this Act for the purposes aforesaid, the statute enacted as follows:—"The Mayor, Aldermen and Commons of the said City in Common Council assembled shall, and they are hereby empowered and required between the first day of October 1737 and the 20th day of November next following and so in every year ensuing between the 1st day of October and the 20th day of November in each succeeding year, to order and appoint what number of watchmen and bedels they shall judge necessary and proper to be kept within each of the several wards of the said City and the liberties thereof, for one whole year commencing from the 25th day of December next ensuing the said order; and shall then and there direct how they ought to be armed, how long they are to watch, what wages and allowances shall be given to the said watchmen and bedels for their attendance; and shall also order and direct what number of constables shall attend every night in each respective ward; and shall make all such other orders and regulations as the nature of each particular service shall seem to them to require."

Sect. 2. "And for the better raising and levying of monies, for paying the wages of the said watchmen and bedels and other charges incident thereto, be it further enacted . . . . that the Mayor, Aldermen, and Commons of the said City in Common Council assembled, every year as aforesaid, shall then and there and they are hereby authorized and impowered to determine and direct what sum and sums of money shall be raised and levied upon each respective ward for answering the purposes aforesaid; and for raising the said several sums of money, to direct the alderman, deputy, and common councilmen of each and every of the respective wards in the said city of London and liberties thereof, or the major part of them, to make an equal rate and assessment upon all and every the person and persons who do or shall inhabit, hold, occupy, or enjoy any land, house, shop, warehouse, or other tenement, within their respective wards (regard being had in making the said rate to the abilities of, and likewise to the rent paid by, the said several inhabitants and occupiers so to be rated and assessed) and the alderman, deputy, and common councilmen of each ward of the said City, or the major part of them, are hereby authorized and required to make such rate and assessment for their respective wards in such manner and form as shall be so directed by the said court of common council; which said rates or assessments so to be made, and all arrears due upon the same, shall be collected quarterly from the several inhabitants or occupiers in each of the said several wards by the several constables for the time being of the several precincts, or by the bedels in each of the said respective wards, as the alderman, deputy, and common councilmen of each ward, or the major part of them, shall direct and appoint; and in case any of the said inhabitants or occupiers shall refuse or neglect to pay the sum so rated and assessed upon him, her, or them, it shall and may be lawful to and for such collector or collectors by warrant under the hand and seal of the Lord Mayor of the said City for the time being, or the alderman of the ward wherein the premises for which such inhabitants or occupiers shall be rated and assessed shall be situate (which warrant the said Lord Mayor or alderman is hereby authorized and required to grant upon oath made before him by the said collector or collectors of the party or parties so refusing or neglecting to pay) to levy the same by distress and sale of the goods and chattels of the party or parties so neglecting or refusing; rendering to him, her, or them, the overplus (if any be) the reasonable charge of making the said distress and sale being first deducted; and for want of such distress by like warrants to commit the party or parties so neglecting or refusing to one of the compters of the said City for the space of one month, or until payment thereof."

. . . . .

The City of London Police Act, 1839, recited the Act of 10 Geo. 2, c. 22, and recited that a more efficient system of police had been established within the City by day and night instead of the nightly watch, and that in order to render the same still more effective it was expedient that that Act should be repealed and that other provisions should be made in lieu thereof; that the Mayor, Aldermen and Councillors of the city of London were willing to contribute a portion of the expense. It proceeded in s. 1 to repeal the Act of 10 Geo. 2, c. 22. By s. 3 of the Act the Commissioner of the City Police was established. By s. 9 a sufficient number of fit and able men were to be appointed by the Commissioner to be a police force for the city of London for preserving the peace, preventing robberies and other felonies, and apprehending offenders against the peace. By s. 14 the Commissioner is to make regulations for the management of the police force. By s. 57 the Mayor and Commonalty and citizens of the City pay and apply in every year from and out of their revenues and possessions one equal fourth part of the expenses of the police force.

Sect. 58 is as follows:—

"And be it further enacted, that in order to raise money for defraying the remaining three equal fourth parts of the said expenses, such just and equal pound rate as the said Mayor, Aldermen, and Commons, in Common Council assembled, shall think fit to order and direct, by writing under the hand of the Town Clerk of the said City, shall be made, laid, and assessed in the several wards of the said City, within fourteen days after the order of the said Mayor, Aldermen, and Commons, in Common Council assembled, by the alderman or his deputy and the major part of the common councilmen of each ward, upon every person who shall inhabit, hold, occupy, possess, or enjoy any house within the several wards respectively, or within any precinct or place within the boundaries of such wards respectively, or adjoining thereto, and not included within the limits of the Metropolitan Police District, whether such person shall be now liable in respect of such house to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house being situate in any precinct or extra-parochial place, for raising such competent sum and sums of money as the said Mayor, Aldermen and Commons, in Common Council assembled, shall from time to time judge needful and direct, so as such rate do not in any one year exceed in the whole the sum of eightpence in the pound on the net annual value of all such houses; and in case it shall be considered by the said Mayor, Aldermen, and Commons, in Common Council assembled, that a fair and just assessment has not been made in any of the wards of the said City, or in any precinct or place, parochial or extra-parochial (if any), it shall be lawful for the said Mayor, Aldermen, and Commons, in Common Council assembled, to direct an assessor or assessors to make a fair and just assessment on the net annual value, the expense whereof shall be paid out of the monies to be raised by virtue of this Act."

Sect. 70. "And forasmuch as it is reasonable that all public buildings (cathedrals, churches, churchyards, chapels, meeting houses, prisons and hospitals for sick persons excepted), and all vacant spaces of ground should be rated and assessed in a due proportion towards the expense of the said police force, be it further enacted, that it shall be lawful for the alderman of each ward within the said City and liberties, or his deputy, with the major part of the common councilmen of such ward, and they are hereby required, at such time as the rates hereinbefore directed to be made by them shall from time to time be made, to rate and assess towards the purposes aforesaid all public buildings whatsoever, and all vacant spaces of ground, situate, lying, and being within their ward, (other and except the Cathedral Church of Saint Paul, London, and the churchyards and ground within the iron rails encompassing the said Cathedral Church and all parish churches, churchyards, chapels, meeting houses, prisons, and such hospitals as aforesaid), at such rate as the said committee shall order and direct for every square yard of such public buildings and vacant spaces of ground, not exceeding the rate of fourpence per square yard; and such rate so to be from time to time made upon any public building (not being a cathedral, parish church, churchyard, chapel, meeting house, prison or hospital as aforesaid), or upon any vacant space of ground shall be paid by the owner thereof; and in case the owner of any such vacant space of ground shall not be known or cannot be found, then the said rate to be thereon made shall be advanced by the Chamberlain of the city of London for the time being out of the cash of the said City in his hands, and the said ground shall be and remain a security to the said Chamberlain and his successors for repayment of all rates so to be by him advanced; Provided always, that meeting houses not licensed, and meeting houses used for any other purpose than Divine worship, shall be rated and assessed in the same manner as other public buildings."

Sect. 85. "And whereas there are various charges of ward clerks and beadles, and other expenses connected with the holding of wardmotes or other ward meetings, and for other local purposes connected therewith, within the several wards of the said City, which have heretofore been paid out of the watch rate; Be it therefore enacted, that all the reasonable charges and expenses of each of the several wards of the said City in respect of the several matters aforesaid, to be from time to time approved and allowed by the inhabitants of each such ward in wardmote assembled, and certified to the said committee by the alderman, deputy and common councilmen of each ward, or the major part of them, shall be paid by the said committee out of the rates to be made by virtue of this Act; and the said committee shall charge the same upon such ward respectively in the next succeeding assessment, when the amount thereof shall be raised in the same manner as and in addition to the rate on such ward for the other purposes of this Act; Provided always, that a distinct account shall be kept of all such charges and expenses separate from the expense of the police force established under this Act."

The City of London Sewers Act, 1848,

Sect. 168. "And in order to raise the money for the carrying the several purposes of this Act into execution, be it enacted, that it shall be lawful for the commissioners, once in every year, or oftener if they think it necessary, to direct, ... one or more rate or rates . . . . to be made upon the owners and holders or occupiers of property within the City, to be called 'The Consolidated Rate,' for the purpose of forming, making, maintaining, keeping in repair, paving, lighting, sweeping, cleansing, and watering the streets within the City, and of making and carrying into effect such improvements within the City as the commissioners are or shall or may from time to time or at any time be authorized to make and carry into effect, and of constructing, altering, repairing, and cleansing the sewers within the City, and for otherwise maintaining effectually the wholesome sewerage and drainage of the City, and also of defraying the salaries, gratuities, wages and allowances of all officers acting in the execution of this Act, unless otherwise provided for, and all other incidental costs, payments, charges, and expenses attending the execution of the powers, duties, and authorities hereby imposed upon and given to the commissioners, and which are not herein otherwise specially provided for, and for securing, raising, and paying any monies, and the interest thereof, which may be borrowed on the security of the said consolidated rate, in pursuance of the provisions of this Act." . . . .

Sect. 169. "Every such rate as aforesaid shall be made by the alderman or his deputy and the major part of the common councilmen of each ward upon every person who shall inhabit, hold, occupy, possess, or enjoy any house or building within the City, or partly within and partly without the

City, (whether such person shall be now liable in respect of such house or building to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situated in any precinct or extra-parochial place, or otherwise), according to the full net annual value thereof respectively, (except in the several cases hereinafter mentioned), the same to be ascertained in manner hereinafter mentioned: and the said rates shall from time to time be collected and paid yearly, half-yearly, or quarterly, or oftener, if the commissioners shall think proper, and shall commence from such time after this Act shall come into operation as the commissioners shall think fit."

Sect. 171. "The annual value of all property rateable under this Act shall be ascertained according to the next preceding annual assessment for the relief of the poor within the several parishes within the City, except in such cases as are hereinafter mentioned."

Sect. 187. "And forasmuch as it is reasonable that all churches, chapels, churchyards, burial grounds, meeting houses, prisons, hospitals for sick persons, and public buildings, and all vacant spaces of ground, should be rated in a due proportion to the rates hereby authorized to be made, be it enacted, that it shall be lawful for the alderman or his deputy and the major part of the common councilmen of each ward, and they are hereby required, at such time as the rates hereinbefore directed to be made by them shall from time to time be made, to rate all parish and other churches, chapels, churchyards, burial grounds, meeting houses, prisons, hospitals for sick persons, and public buildings whatsoever, and all vacant spaces of ground, situate, lying, and being within the City (other than and except the Cathedral Church of Saint Paul, and the churchyards and ground within the iron rails encompassing the said Cathedral Church) at such rate as the commissioners shall order and direct for every square yard of such public buildings and vacant spaces of ground, not exceeding the rate of . . . . threepence per square yard towards the consolidated rate; and every such rate so to be from time to time made upon any parish or other church, chapel, churchyard, burial ground, meeting house, prison, hospital, or public building as aforesaid, or upon any vacant space of ground, shall be paid by the owner thereof, and in case of a parish church or churchyard or burial ground, by the overseers of such parish, out of the rates incidental to the relief of the poor;" . . . .

The City of London (Union of Parishes) Act, 1907, contains the following provisions:—

Sect. 15.—"(1.) On and after the appointed day the sewer rate consolidated rate and police rate and any rate leviable for the purposes of defraying the necessary charges and incidental expenses of the militia under the Act 1 George IV. cap. 100 (commonly known and hereinafter referred to as 'The Trophy Tax') shall be assessed made levied and collected together by the Common Council as one rate which shall be termed the general rate and shall be assessed made collected and levied as if it were the consolidated rate and subject to the provisions of this Act all enactments applying or referring to the consolidated rate shall (with the exception that the said rate shall be assessed made and levied by the Common Council for the whole of the said City and not by the alderman or his deputy and the major part of the common councilmen of each ward within the said City) be construed as applying or referring to the general rate but nothing in this section shall authorise the Common Council to levy a greater rate in the pound for the purposes of the City of London Sewers Act, 1848, and the City of London Police Act, 1839, and the Acts amending the same respectively than is authorised under such Acts: Provided always that the amount in the pound which the Common Council may levy in respect of the respective portions of the general rate which represent the sewer rate the consolidated rate and the police rate respectively shall be the same as the amount in the pound which might have been levied in respect of each of those rates respectively if this Act had not passed.

"(2.) So much of the City of London Sewers Act, 1848, and the City of London Police Act, 1839, as provides that the Common Council may direct the alderman or his deputy and the major part of the common councilmen of every ward to make a rate is hereby repealed as from the appointed day and all other provisions of the City of London Sewers Act, 1848, relating to the consolidated rate shall be construed as if all references therein to the persons making the consolidated rate were references to the Common Council and as if all references therein to the consolidated rate were references to the general rate.

"(3.) On and after the appointed day all rates which have accrued due and payable to the Common Council up to the appointed day and remain unpaid shall be recoverable by the Common Council as if this Act had not been passed.

"(4.) The expenses of the Common Council (other than those provided for by the section of this Act of which the marginal note is 'Poor Rate') shall so far as the same are now payable by means of or out of any rates leviable within the city of London be paid out of the general rate to be made from time to time by the Common Council under this Act."

Sect. 17.—"(1.) As from the appointed day the charges and expenses in each of the several wards in the City of London in respect of ward clerks and beadles and other expenses connected with the holding of wardmotes or other ward meetings and for other local purposes connected therewith which have heretofore been paid out of the watch rate or the ward rate shall be from time to time paid by the Common Council out of the general rate to be made under this Act and a separate account shall be kept of all such charges and expenses: Provided that such charges and expenses in each ward shall not exceed the sum fixed for that ward by regulations to be made by the Common Council which regulations may be varied from time to time as and when they shall think fit.

"(2.) As from the appointed day section 85 of the City of London Police Act, 1839, is hereby repealed," . . . .

Sect. 35. "Nothing in this Act or in any scheme to be made under this Act shall confer or derogate from or otherwise affect any exemption or deduction from or allowance out of any rate to which this Act relates or any privilege of or provision for being rated on any exceptional principle of valuation."

W. H. G.

1914
March 28.

SIMPSON *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Land Values—Provisional Valuation—Appeal from Referee—Order to pay "Expenses"—Unascertained Amount—Rule of Court—Finance (1909-10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *s.* 33, *sub-s.* 3.

By s. 33, sub-s. 1, of the Finance (1909-10) Act, 1910, any person aggrieved may appeal against a determination by the Commissioners of Inland Revenue of the total value or site value of any land. By sub-s. 2 the appeal is to be referred to a referee. By sub-s. 3 the referee is to determine any matter referred to him in consultation with the Commissioners and the appellant, and may order that any expenses incurred by the Commissioners be paid by the appellant; and "any order of a referee as to expenses may be made a rule of Court."

On the hearing of an appeal under this enactment the referee made an order in the following terms:—"I order that any expenses incurred by the Commissioners be paid by the appellant."

On a motion to make this award a rule of Court:—

Held, that the award was void for uncertainty and could not be made a rule of Court.

Motion to make an order of a referee as to expenses a rule of Court under s. 33, sub-s. 3, of the Finance (1909-10) Act, 1910. (1)

The Commissioners made a provisional valuation of certain land of which the appellant E. R. Simpson was the owner. The provisional valuation contained the following items:—1. Gross value 900*l.*; 2. Difference between gross value and value of the fee simple of the land divested of buildings, trees, &c., 700*l.*;

---

(1) Sect. 33, sub-s. 1, of the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), enables any person aggrieved to appeal against a determination by the Commissioners of the total value or site value of any land as therein mentioned. By sub-s. 2 the appeal is to be referred to a referee.

By sub-s. 3, "The referee shall determine any matter referred to him in consultation with the Commissioners and the appellant, or any persons nominated by the Commissioners and the appellant respectively for this purpose, and may, if he thinks fit, order that any expenses incurred by the appellant be paid by the Commissioners, and that any such expenses incurred by the Commissioners be paid by the appellant.

"Any order of the referee as to expenses may be made a rule of the High Court."

12. Deductions from gross value to arrive at full site value 700*l.* The total value was given as 900*l.*; the full site value as 200*l.*; and the assessable site value as 200*l.*

The appellant gave notice of appeal against the total value on the ground that the items numbered 1, 2, and 12 in the provisional valuation were insufficient.

On June 10, 1913, the referee decided as follows: "The items numbered 1, 2, and 12 in the provisional valuation are sufficient. I order that any expenses incurred by the Commissioners be paid by the appellant."

On July 23, 1913, the Solicitor of Inland Revenue wrote to the appellant in these terms: "I am directed by the Commissioners of Inland Revenue to apply to you for payment of the expenses incurred by them in this appeal which were ordered by the referee to be paid by you in his award of June 10 last. The amount of such expenses is 33*l.* 12*s.* 3*d.* and I should be glad to receive a cheque for that sum."

On October 31, 1913, the Solicitor of Inland Revenue wrote again to the appellant demanding payment of the sum of 33*l.* 12*s.* 3*d.*

On November 4, 1913, the appellant wrote to the Solicitor of Inland Revenue: "With reference to your letter of the 31st ult. the referee did not order me to pay the sum of 33*l.* 12*s.* 3*d.* or any other ascertained sum for the expenses of the Commissioners. The order he did make as to expenses is invalid and imposes no obligation on me."

After further correspondence the Commissioners of Inland Revenue made this application that the decision of the referee might be made a rule of Court.

W. Finlay, for the Commissioners of Inland Revenue.

W. Allen, for the appellant. The award is bad for uncertainty in that it does not quantify the expenses. An award that one of the parties should pay to the other such a sum as would be sufficient to entitle the latter to have a mortgage discharged was held bad for want of finality where the amount was not specified: *Hewitt* v. *Hewitt.*(1)

---

(1) (1841) 1 Q. B. 110.

[SCRUTTON J. In Rolle Abr., Abitrement (H) 14, it is said to have been decided on demurrer in a case of *Beale* v. *Beale* in the King's Bench, Michaelmas Term, 10 Car. (1635), that if there be a submission of all disputes touching a voyage and a bond with a condition for performance of it, and an award be made that one party shall pay his part of the expense of the voyage and allow in account his proportionate part of the loss falling upon the ship by reason of the voyage, although that award is of itself uncertain yet being for that which can be reduced to certainty, the award is good. See also *Fox* v. *Smith* (1); Russell on Arbitration, 7th ed. (1891), pp. 290, 382; 9th ed. (1906), p. 241.]

It is true that an arbitrator may award a sum to be ascertained by a ministerial officer. Where the submission contains a clause to the effect that the submission or award may be made a rule of Court, or where the arbitration falls under s. 1 of the Arbitration Act, 1889, there an award for a sum certain and costs is good, because the taxing Master, a ministerial officer, fixes the amount: *Holdsworth* v. *Wilson* (2); *Metropolitan District Ry. Co.* v. *Sharpe* (3); *Roulstone* v. *Alliance Insurance Co.* (4) But where an award was for the costs in an inferior Court, there unless the amount was quantified the award was bad: *Addison* v. *Gray* (5); and an award for expenses is bad unless the amount is fixed by the arbitrator: *Bargrave* v. *Atkins.* (6)

There is no power except by agreement between the parties, or by statute, formerly by s. 8 of the Common Law Procedure Act, 1854, and now by s. 10 of the Arbitration Act, 1889, to refer an award back to the arbitrator: *In re Keighley, Maxsted & Co. and Durant & Co.* (7)

W. Finlay, in reply. If this award had been made in Scotland no exception could have been taken to it, and it would have been made a rule of Court as a matter of course, under s. 42, sub-s. 2, of the Act. It cannot be supposed that in this respect the law in the two countries was intended to be different.

(1) (1765) 2 Wils. 267.

(2) (1863) 4 B. & S. 1.

(3) (1880) 5 App. Cas. 425, at p. 444.

(4) (1879) 4 L. R. Ir. 547, at p. 552.

(5) (1766) 2 Wils. 293.

(6) (1695) 3 Lev. 413.

(7) [1893] 1 Q. B. 405, at p. 408.

In Scotland "expenses" means "costs." It must have been intended that the word should have the same meaning all over the United Kingdom. If the present order had been for costs instead of expenses there would have been no difficulty. There is no difference in substance between the two expressions.

SCRUTTON J. As to the first part of this motion, that the decision of the referee should be made a rule of Court, Mr. Allen took the point that the decision could not be made a rule of Court because it was bad in that it does not specify the amount of the expenses. So far as I know the term "expenses" is not, as the term "costs" is, a term of art in English law. If a taxing Master were directed to tax "expenses" he would not understand what he was to do. In Scotland it is otherwise. There "expenses" means what we mean by "costs." By s. 42, sub-s. 2, of this Act, in the application of the Act to Scotland, "any order of a referee as to expenses shall be enforceable as a recorded decree arbitral." Therefore if this order in its terms were made in Scotland no difficulty would arise. The matter would go before the official equivalent of a taxing Master who would know what he had to deal with. A difficulty does arise in England because in England "expenses" is not a term of art; it is a vague and general term. It may be that the Legislature deliberately used an informal term because it was anticipated that this procedure before a referee would be much less formal than it has in fact become. This difficulty would have been avoided if the referee in the present case had used the word "costs" instead of "expenses," because an award of an arbitrator awarding costs is not bad merely because he does not fix the amount. When the matter is in the High Court that Court fixes the amount through a taxing Master who is a ministerial officer. This rule applies equally whether by statute or by agreement the submission is or may be made a rule of Court. In *Holdsworth* v. *Wilson* (1) Erle C.J., delivering the judgment of the Court, said: "It has always been considered that, between parties to an action in the superior Courts, an award of costs means judicially the costs of the litigation; and that the amount

---

(1) 4 B. & S. 1, at p. 8.

1914

SIMPSON v. INLAND REVENUE COMMISSIONERS.

Scrutton J.

is to be ascertained ministerially by the proper officer of the Court. The same rule applies to an award under an Act of Parliament. By reason of the submission being made a rule of Court the taxing officer of the Court has authority between the parties to settle the amount of the costs." The rule that the High Court will by its officer fix the amount of the costs did not apply where the order to pay costs was an order of an inferior Court because a Master of the High Court did not tax costs in an inferior Court. It only applied where by statute or by agreement the submission was made a rule of the High Court. Even then it had to be an order to pay costs, not an order to pay expenses, because a Master of the High Court taxes costs and does not tax expenses. I have before me an order of a referee ordering payment of expenses of unascertained amount. I cannot make the amount certain through the taxing officers of this Court. Therefore the decision of the referee is bad on this point because it does not assess the amount of the expenses, and the amount of expenses cannot be assessed by a taxing Master taxing costs.

I raised the point whether this Court had power to supply the omission by sending the decision back to the referee that he might assess the amount; but counsel on both sides concur in my view that in the absence of agreement or statutory provision there is no power to do this. At common law there is no power to remit an award to an arbitrator. This difficulty was first avoided by agreement between the parties that the award should be made a rule of Court. Then by the Common Law Procedure Act, 1854, and afterwards by the Arbitration Act, 1889, provision was made for this purpose; but that statutory provision does not apply to this new tribunal created under the Finance (1909-10) Act, 1910. This motion must therefore be dismissed.

Motion dismissed.

Solicitors for appellant: *Batten, Proffitt & Scott.*
Solicitor for Commissioners: *The Solicitor of Inland Revenue.*

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.
1914
March 10, 11.

NORTH RIDING OF YORKSHIRE COUNTY COUNCIL *v.* MIDDLESBROUGH COUNTY BOROUGH COUNCIL.

Local Government—Creation of County Borough—Adjustment of Financial Relations between County and Borough—Grant of Quarter Sessions to Borough—Costs of Quarter Sessions, Petty Sessions, and Coroners—Redemption of Liability of Borough to contribute—Local Government Act, 1888 (51 *&* 52 *Vict.* c. 41), *s.* 32, *sub-s.* 3 (*b*).

By s. 31 of the Local Government Act, 1888, certain large boroughs named in the Third Schedule to the Act (of which Middlesbrough was one) were to be county boroughs.

By s. 32, sub-s. 3 (*b*), "If the borough is not at the passing of this Act a quarter sessions borough, the borough council shall contribute a proper share of the costs of and incidental to the quarter sessions and petty sessions of the county, and of and incidental to the coroners of the county or any franchise therein, and if a grant of a Court of quarter sessions is hereafter made to the borough, the borough shall redeem the liability to such contribution, on such terms as may be agreed upon, or, in default of agreement, may be determined by arbitration under this Act."

Middlesbrough was not at the passing of the Act a quarter sessions borough, and under an order of commissioners appointed under the Act the borough paid to the county of the North Riding of Yorkshire the annual sum of 381*l.*, of which 337*l.* 6*s.* 11*d.* represented the borough's share of the costs incurred by the county of and incidental to quarter sessions, petty sessions, and coroners. In 1910 a grant of a Court of quarter sessions was made to the borough.

In an arbitration to determine the terms upon which the liability of the borough to make the contribution of the annual sum of 337*l.* 6*s.* 11*d.* should be redeemed, the county council refused to call evidence, contending that the sum should be redeemed at its present value as a perpetual annuity. The borough called evidence (which was objected to but admitted by the arbitrator) to the effect that the share of the costs of quarter sessions, petty sessions, and coroners of the county incurred in respect of the borough exceeded in each year the said annual sum. The arbitrator found that the above-mentioned share of the costs exceeded the annual sum, and he made his award in the form of a special case stating that if the evidence was admissible he awarded that the annual sum should be redeemed on payment of 20*s.*; that if the evidence was not admissible and if the annual sum should be redeemed at its present value as a perpetual annuity, he awarded that it should be redeemed on payment of 10,379*l.* 17*s.* 5*d.*; but that if the evidence was not admissible and also the annual sum should be redeemed on some

C. A.
1914

NORTH RIDING OF YORKSHIRE COUNTY COUNCIL
v.
MIDDLESBROUGH COUNTY BOROUGH COUNCIL.

other basis than that of a perpetual annuity, the matter was to be remitted to him for reconsideration.

Bailhache J. held that the evidence was admissible, but remitted the matter to the arbitrator for reconsideration.

Held, on appeal, that the county council were not entitled to have the annual sum redeemed at its present value as a perpetual annuity; that evidence was admissible to shew on the one hand the benefit to the county through having no longer to render the services to the borough and on the other hand the continuing burden on the county owing to liabilities which had been already incurred in respect of those services and could not be terminated at once; that therefore the evidence was properly admitted; and that judgment must be entered for 20*s.* in accordance with the terms of the award as stated in the special case, the Court having no power in these circumstances to remit the matter.

Decision of Bailhache J. [1913] 1 K. B. 93 varied.

APPEAL from the decision of Bailhache J. upon an award stated by an arbitrator in the form of a special case; reported [1913] 1 K. B. 93.

The borough of Middlesbrough was specified in the Third Schedule to the Local Government Act, 1888 (1), as being a

---

(1) Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 31: "Each of the boroughs named in the Third Schedule to this Act being a borough which on the first day of June one thousand eight hundred and eighty-eight, either had a population of not less than fifty thousand, or was a county of itself shall, from and after the appointed day, be for the purposes of this Act an administrative county of itself, and is in this Act referred to as a county borough . . . ."

Sect. 32, sub-s. 1: "An equitable adjustment respecting the distribution of the proceeds of the local taxation licences, and probate duty grant, and respecting all other financial relations, if any, between each county and each county borough specified in the said schedule as being deemed for the purposes of this Act to be situate in that county, shall be made by agreement, within twelve months after the appointed day, between the councils of each county and each borough, and in default of any such agreement by the commissioners appointed under this Act; and such adjustment shall provide, in the case of any expenses which may in future be incurred by the county wholly or partly on behalf of the borough, for the liability of such borough to contribute, and save as provided by this Act any existing liability to contribute or to incur expense shall, after the appointed day, cease, and an equitable provision for such cessation shall be made in the adjustment."

Sub-s. 3 (*b*): "If the borough is not at the passing of this Act a quarter sessions borough, the borough council shall contribute a proper share of the costs of and incidental to the quarter sessions and petty sessions of the county, and of and incidental to the coroners of county borough deemed for the purposes of that Act to be situate in the North Riding of Yorkshire. The borough of Middlesbrough was not at the passing of the Act a quarter sessions borough within the meaning of the Act.

By art. 2 of an order made by the commissioners appointed under the Act and bearing date April 27, 1892, it was, in pursuance of ss. 32 and 61 of the Act, and of the Expiring Laws Continuance Act, 1891 (54 & 55 Vict. c. 60), ordered as follows:

"(1.) The council of the county borough of Middlesbrough shall pay to the county council of the North Riding of Yorkshire a contribution at the rate of 381*l.* annually towards the costs incurred by the county council of and incidental to the assizes and quarter and petty sessions and of and incidental to the coroners of the county and towards the costs of registration of the county parliamentary voters.

"(2.) The first contribution payable under this article shall be in respect of the six months ending the thirty-first day of March one thousand eight hundred and ninety-two."

The annual contribution had been duly paid by the borough of Middlesbrough (hereinafter called "the borough council") to the county council of the North Riding of Yorkshire (hereinafter called "the county council") in pursuance of the order up to August 2, 1910, on which day a grant of a Court of quarter sessions was made to the borough.

By a claim dated December 1, 1910, the county council claimed that so much of the annual contribution of 381*l.* mentioned above as represented the borough's share of and incidental to the costs of quarter sessions, petty sessions, and coroners, namely, the sum of 337*l.* 6*s.* 11*d.* (hereinafter called "the said annual sum"), should be redeemed by payment by the borough council to the county council of a capital sum which being invested at the rate of 3*l.* 5*s.* per centum would produce an income equivalent to the borough's share of the costs, that is to say, the capital sum of 10,379*l.* 17*s.* 5*d.*

---

the county or any franchise therein, and if a grant of a Court of quarter sessions is hereafter made to the borough, the borough shall redeem the liability to such contribution, on such terms as may be agreed upon, or, in default of agreement, may be determined by arbitration under this Act:"

C. A.
1914

North Riding of Yorkshire County Council v. Middlesbrough County Borough Council.

The borough council refused to redeem the liability to the portion of the annual contribution on the terms so claimed. The councils failed to agree upon the terms on which the liability should be redeemed and differed as to the appointment of an arbitrator to whom the settlement of the terms should be referred.

In pursuance of an application made by the county council to the Local Government Board under s. 62, sub-s. 2, of the Local Government Act, 1888, the Board appointed Mr. Alexander Glen, K.C., to act as arbitrator in the matter.

It was contended before the arbitrator on behalf of the county council (for whom no witnesses were called) that the terms on which the annual sum of 337*l.* 6*s.* 11*d.* was to be redeemed ought to consist of the payment of a capital sum which being invested at such a rate of interest as the arbitrator might determine would produce an income equivalent to that annual sum, and that in settling the terms he ought not to take into consideration the share of the costs of and incidental to the quarter sessions and petty sessions and coroners of the county which was attributable to or incurred in respect of the borough before August 2, 1910, or which would have continued to be so attributable or incurred after that date if no grant of a Court of quarter sessions had been made to the borough.

On behalf of the borough council it was alleged that the share of the costs of and incidental to the quarter sessions and petty sessions and coroners of the county which was attributable to or incurred in respect of the borough before August 2, 1910, exceeded, and that the share which would have continued to be so attributable or incurred after that date if no grant of a Court of quarter sessions had been made to the borough would have continued to exceed, in each year the said annual sum. And it was contended (*a*) that the said annual sum which was required by the Act of 1888 to be redeemed on terms to be agreed upon or determined by arbitration was payable by the borough council to the county council in respect of and in consideration of the incurring by the county council of so much of the costs of and incidental to the quarter sessions and petty sessions and coroners of the county as was attributable to or incurred in respect of the borough; (*b*) that the grant of a Court of quarter sessions in consequence whereof the said annual sum was required to be redeemed relieved the county council from incurring costs of and incidental to Courts of quarter and petty sessions and coroners as far as such Courts and coroners would otherwise have continued to be required for the purposes of or such costs would otherwise have been attributable to or incurred in respect of the borough, that is to say, from incurring costs to an amount exceeding in each year the said annual sum; and (*c*) that no terms of redemption of such annual sum would be fair or equitable which required the borough council to pay any substantial sum for such redemption. And it was further and in the alternative contended (*d*) that even if none of the foregoing contentions (*a*), (*b*), and (*c*) were well founded the claim for payment of the capital sum of 10,379*l.* 17*s.* 5*d.* was excessive.

Evidence was tendered for the borough council in support of the allegations made on their behalf, and objection to the reception of such evidence was made on behalf of the county council on the ground that the allegations and evidence were irrelevant or immaterial to the matter in dispute between the parties and that such evidence was not admissible or ought not to be received by the arbitrator. The arbitrator, being of opinion that the evidence was admissible, relevant, and material, received the same, but consented to state his award in the form of a special case for the opinion of the Court.

The arbitrator found: (1.) That the share of the costs of and incidental to the quarter sessions and petty sessions and coroners of the county which was attributable to or incurred in respect of the borough before August 2, 1910, exceeded, and that the share which would have continued to be so attributable or incurred after that date if no grant of a Court of quarter sessions had been made to the borough in all reasonable probability would have continued to exceed, in each year the annual sum of 337*l.* 6*s.* 11*d.* (2.) That if the foregoing finding was irrelevant or immaterial or ought not to be taken into consideration the present value of the annual sum treated as a perpetual annuity was the aforesaid sum of 10,379*l.* 17*s.* 5*d.*

The questions for the opinion of the Court were:—

"1. Whether the evidence to which objection was taken on behalf of the county council as aforesaid ought to have been received and considered by me.

"2. If not, whether the said annual sum ought to be redeemed at its present value as a perpetual annuity, or on what other basis or principle the terms of redemption ought to be settled.

"If the Court shall be of opinion that the said evidence ought to have been received and considered by me, I award and declare that the said annual sum of 337*l.* 6*s.* 11*d.* shall be redeemed on the following terms, that is to say, on payment by the county borough council to the county council of the sum of 20*s.* . . . .

"If the Court shall be of opinion that the said evidence ought not to have been received or considered by me, but that the said annual sum ought to be redeemed at its present value as a perpetual annuity, I award and declare that such sum shall be redeemed on the following terms, that is to say, on payment by the county borough council to the county council of the sum of 10,379*l.* 17*s.* 5*d.* . . . .

"But if the Court shall be of opinion that the said evidence ought not to have been received or ought not to have been considered by me, and also that the terms on which the said annual sum shall be redeemed ought to be settled on some other basis or principle than the basis of the present value of such annual sum treated as a perpetual annuity, then the Court is requested to remit the matter to me for my reconsideration, subject to the opinion of the Court."

Bailhache J. held that the evidence was admissible and was rightly accepted, and that the annual sum should not be redeemed on the basis of its value as a perpetual annuity; but he remitted the award to the arbitrator for reconsideration, with a direction that the arbitrator ought to take into consideration all the circumstances of the case, on the one hand the fact that the services were rendered by the county at a loss, and on the other hand the fact that though the services ceased to be rendered to the borough it did not follow that the county would profit to the full extent of the loss incurred by rendering the services, as there were probably certain standing charges which would still continue to be payable. (1)

The Middlesbrough Borough Council appealed, and the North Riding County Council gave notice of cross-appeal.

Forbes Lankester, K.C., and *J. Jeeves*, for the Middlesbrough Borough Council. The learned judge, having in answer to the first question held that the evidence was rightly admitted and considered, had no power to remit the award to the arbitrator. The arbitrator has finally stated what his award is upon the answer of the learned judge to that question, namely, an award of 20*s*. The learned judge had only power, upon the case as stated, to remit the matter to the arbitrator if he was of opinion that the evidence ought not to have been received, and also that the terms on which the annual sum should be redeemed ought to be settled on some other basis than that of its present value as a perpetual annuity. That paragraph in the case did not give the learned judge, after his answer to the first question, any power to remit the case to the arbitrator. The learned judge seems to have overlooked that, and to have thought that he had power to remit the award notwithstanding that answer. The county council deliberately refused to call evidence upon the matters which the learned judge in his judgment said the arbitrator should take into consideration. The arbitrator did consider the evidence produced before him upon those matters, and found upon the evidence that 20*s*. was the proper sum for redemption. As Bowen L.J. said in *In re Knight and Tabernacle Permanent Building Society* (2), and repeated in *In re Kirkleatham Local Board and Stockton and Middlesbrough Water Board* (3), " He (the arbitrator) may state his award in the form of a special case. When that is done the arbitrator has exhausted his powers; he has made his award in such a shape that the opinion of the Court will determine the rights of the parties, and turn the award into one groove or the other." Subject therefore to the cross-appeal of the county council, the appellants are entitled to have judgment entered for them for redemption on payment of 20*s*.

---

(1) [1913] 1 K. B. 93.
(2) [1892] 2 Q. B. 613, at p. 618.
(3) [1893] 1 Q. B. 375, at p. 380.

NORTH RIDING OF YORKSHIRE COUNTY COUNCIL v. MIDDLESBROUGH COUNTY BOROUGH COUNCIL.

J. Sankey, K.C., and *G. F. Mortimer*, for the county council. The county council ought to have an opportunity of calling evidence upon the matters suggested by the learned judge, and for this purpose the case ought to be remitted to the arbitrator. The words "and also" in the last paragraph of the case, giving the Court power to remit the matter to the arbitrator, must be read as "or."

With regard to the cross-appeal, the first and second questions submitted by the arbitrator to the Court ought to have been answered in favour of the county council, namely, that the evidence was not admissible, and that the annual sum ought to be redeemed at its present value as a perpetual annuity. The award should therefore be for 10,379*l.* 17*s.* 5*d.* By s. 32, sub-s. 3 (*b*), of the Local Government Act, 1888, the borough, upon receiving a grant of quarter sessions, is to "redeem the liability to such contribution." Under s. 32 "an equitable adjustment" of the financial relations between the county and the borough was made when the Act of 1888 came into operation, and in such adjustment regard was had, under sub-s. 3, to all the circumstances which it appeared equitable to consider. Inasmuch as the borough was not then a quarter sessions borough, the borough council had, under the first part of sub-s. 3 (*b*), to "contribute a proper share of the costs of and incidental to the quarter sessions and petty sessions of the county, and of and incidental to the coroners of the county." In making that equitable adjustment under s. 32 the commissioners appointed under the Act did not, very properly, proceed upon the basis of services rendered. They took the total expenses of the county in respect of the five items of expenditure under the heading of assizes, quarter sessions, petty sessions, coroners, and registration of voters, and divided them between the county and the borough according to their respective rateable values. (1) For instance, the cost to the county of petty sessions was so divided, although at the date of the passing of the Act Middlesbrough maintained its own petty sessions, and the county therefore rendered no services to the borough in that matter.

---

(1) A document was handed to the Court shewing how the commissioners arrived at their figures.

The obligation of the borough may be looked upon as in the nature of a unilateral obligation to pay an annual sum to the county, and not as a bi-lateral obligation, on the one side to render certain services and on the other to pay an annual sum for the cost of those services. Sect. 32, sub-s. 3 (*b*), when it requires the borough to " redeem " the liability to pay the annual sum does not specify any equitable adjustment. The obligation is to " redeem the liability to such contribution." The word " redeem " means to buy back, and the proper mode of buying back the liability to contribute annually 337*l*. 6*s*. 11*d*., which is the agreed proportion of 381*l*. applicable to the cost of quarter sessions, petty sessions, and coroners, is to fix a capital sum which will produce that annual sum. The redemption is to be "on such terms as may be agreed upon, or, in default of agreement, may be determined by arbitration." Those words are sufficiently satisfied by the arbitrator having to settle the amount of the contribution applicable to the three heads in question, and having arrived at that amount to say upon what interest table the capital sum should be calculated, and further whether the payment of that capital sum should be spread over a number of years or paid at once. All that would be for the arbitrator to determine. The word " redeem " occurs again only in s. 70, sub-s. 1, of the Act, in reference to the redemption of county stock, where it is used as meaning to redeem in full. In *West Hartlepool Corporation* v. *Durham County Council* (1) Lord Loreburn L.C. points out (at p. 250) that the word " compensation " is not used in s. 32, and Lord Atkinson (at p. 253) seems to think that under s. 32, sub-s. 3 (*b*), the liability to contribute may continue after the county has ceased to perform the services, and the county borough must redeem that liability. Therefore it does not solve the question to say that the services have ceased to be rendered, and that the cost of the services has ceased. It cannot properly be said that a liability to contribute annually 337*l*. 6*s*. 11*d*. is redeemed by paying 20*s*. An illustration of the meaning of the word "redeem" may be taken from s. 32, sub-s. 1, of the Finance Act, 1896 (59 & 60 Vict. c. 28), which provides that the owner of land may redeem the land tax by payment of a capital sum equal to thirty times the sum assessed on the land. "Redeem" has the same meaning in s. 32, sub-s. 3 (*b*), of the Act of 1888. The fact that, under sub-s. 6, the annual sum may be reviewed every five years does not affect its nature. Under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), Sched. I., paragraph 17, the liability to make a weekly payment may be "redeemed" by payment of a lump sum of such an amount as, where the incapacity is permanent, will purchase a life annuity equal to 75 per cent. of the annual value of the weekly payment. If the weekly payment had continued, the workman might conceivably recover sufficiently to allow of the weekly payment being reduced, but still the liability to be redeemed is the liability to make the weekly payment in existence at the time of redemption. So here, the liability to be redeemed is the liability to make a present annual payment of 337*l.* 6*s.* 11*d.*, and that must mean by paying such a capital sum as will produce an equivalent annual sum. The evidence therefore received by the arbitrator was not admissible, and the two questions in the case should be answered in favour of the county council, namely, that the evidence ought not to have been received and considered, and that the annual sum ought to be redeemed at its present value as a perpetual annuity; and upon those answers the award is in favour of the county council for 10,379*l.* 17*s.* 5*d.*

---

(1) [1907] A. C. 246.

Forbes Lankester, *K.C.*, and *J. Jeeves*, for the county borough of Middlesbrough, were not called upon to argue the cross-appeal.

Lord Sumner. This is an appeal from the decision of Bailhache J. upon an award stated in the form of a special case. The learned judge answered the first question left to him by saying that the evidence was admissible and was rightly received, but nevertheless he remitted the award to the arbitrator to reconsider the matter. Neither party is satisfied with that result. The borough council contend that upon that answer the award must be for 20*s.* only. The county council on the other hand contend that the evidence ought not to have been received, and that they are entitled to have the annual sum redeemed at its present value as a perpetual annuity. The award, having stated one result upon the hypothesis that the evidence was rightly received, and another result upon the hypothesis that it was wrongly received, further stated that "if the Court shall be of opinion that the said evidence ought not to have been received or ought not to have been considered by me, and also that the terms on which the said annual sum shall be redeemed ought to be settled on some other basis or principle than the basis of the present value of such annual sum treated as a perpetual annuity,"—that is, the basis stated in the second question—"then the Court is requested to remit the matter to me for my reconsideration." The arbitrator, having stated his award in the form of a special case, was discharged of his functions except so far as he kept those functions alive under this paragraph. The learned judge, having in answer to the first question held that the evidence was rightly received and considered by the arbitrator, had no power to remit the award. Unless therefore the contention of the county council is correct that the evidence was wrongly received and considered, it follows that the award must stand for 20*s*.

The contention of the county council arises in this way. Middlesbrough became a county borough on the passing of the Local Government Act, 1888, and thereupon the financial relations between the North Riding, in which it was situate, and the borough had to be adjusted. Sect. 32 of the Local Government Act, 1888, provides for the mode in which that is to be done. In default of agreement the adjustment is to be made by commissioners appointed under the Act. It is unnecessary to refer to the provisions in sub-s. 1 dealing with the equitable adjustment of certain revenues and other financial relations between the county and the county borough. There is, however, a special direction given to the commissioners in sub-s. 3 (*b*) with regard to the costs of quarter sessions, petty sessions, and coroners. "If the borough is not at the passing of this Act a quarter sessions borough, the borough council shall contribute a proper share of the costs of and incidental to the quarter sessions and petty sessions of the county, and of and incidental to the coroners of the county or any franchise therein." The commissioners in 1892 fixed an annual contribution of 381*l*. payable by the borough to the county in respect of the above

C. A.
1914

NORTH RIDING OF YORKSHIRE COUNTY COUNCIL v. MIDDLESBROUGH COUNTY BOROUGH COUNCIL.

Lord Sumner.

mentioned three services as well as in respect of assizes and registration of county parliamentary voters. This contribution was by sub-s. 6 subject to review quinquennially. In fact it has never been reviewed. In 1910 a grant of a Court of quarter sessions was made to Middlesbrough. It thereupon became necessary to reopen part of what had been adjusted, because it was not contemplated that in such a case Middlesbrough should pay for quarter sessions, for instance, twice over, once by paying for her own quarter sessions, and again by continuing to make a contribution to the county upon the assumption that the county was providing quarter sessions for her. The provision for this second and later event might have been put into a separate section, but it follows in the same sub-section immediately upon the words I have just read thus: "and if a grant of a Court of quarter sessions is hereafter made to the borough, the borough shall redeem the liability to such contribution, on such terms as may be agreed upon, or, in default of agreement, may be determined by arbitration under this Act." The borough has to redeem the liability to such contribution, that is to say, a contribution of a proper share of the costs of and incidental to the services in question. It is clear that, whatever the words "on such terms as may be agreed upon" mean, they do not assist the county council's argument on the construction of the word "redeem"; and the further words, on such terms as "may be determined by arbitration," would tend rather to shake than to strengthen that argument. It is therefore unnecessary further to refer to those words, because, in my opinion, the word "redeem" cannot be so construed as to exclude the admission of all evidence of such a character as was admitted in this case.

The county council contend that the borough has to redeem the annual sum of 337*l.* 6*s.* 11*d.* We have been told, though I do not think that it advances the argument, that the commissioners, when fixing in 1892 the annual contribution of 381*l.*, took the cost to the whole county of the five specified services, and divided that cost between the county and the borough according to rateable value; and that thus they arrived at a proportion of the actual expenditure upon those services which was deemed to constitute the proper contribution for Middlesbrough.

When the borough became a quarter sessions borough a calculation was made of the items representing the cost attributable to the three services of quarter sessions, petty sessions, and coroners, which the borough was thenceforward to provide for herself, the figures being readjusted upon the same basis as before, and thus the sum of 337*l.* 6*s.* 11*d.* was arrived at. The county council say that this 337*l.* 6*s.* 11*d.* is an item of their revenue; that it is not based upon the cost of the services actually rendered by the county to the borough, because for years, we are told, though there is no evidence upon this, the county has not been holding petty sessional courts in the borough; and that inasmuch as this head of revenue is to be cut off, the borough must redeem it as it has to redeem any other perpetual annual payment, any other unilateral obligation, by calculating upon some actuarial basis to be fixed by the arbitrator what is the present capitalized value of the perpetual annual contribution. Taking that view the county council gave no evidence as to the actual cost of the services which they had been rendering to the borough under these heads, and they objected to any such evidence on the part of the borough council as being inadmissible. I presume that, in their view, no evidence would be admissible except to shew what is the proper factor of multiplication to convert this annual sum into a capital sum. The borough tendered evidence which was admitted and which satisfied the arbitrator that the cost of the services in question rendered by the county to the borough exceeded the annual sum of 337*l.* 6*s.* 11*d.* No evidence having been offered on the other side to shew that there were capital outlays or other liabilities which had been incurred and which could not be terminated forthwith, he came to the conclusion that the cessation of the service was, in that state of the evidence, in itself a sufficient redemption, and he awarded a nominal sum. Whether his conclusion was right or wrong in fact does not concern us. He was the tribunal of fact, and the only ground upon which, as the case is stated, the county council can succeed upon their cross-notice of appeal is by shewing that the word "redeem" is such as to exclude any evidence of that character. I am unable to follow the argument. The gist of the legislation is that upon Middlesbrough becoming a county borough it has to make a contribution to the county, and although it may be that the contribution is not based simply upon an estimate of the cost of the services which the county will render and the borough must pay for, it does take account of matters which involve the county in expenditure and of services which from the time of the grant of quarter sessions to the borough will no longer in fact be rendered and which the borough will have to provide for itself. Accordingly one would expect some provision in the Act for reopening the matter, not on the one hand upon the terms of giving to the county a profit and imposing upon the borough a heavy burden as a penalty for having obtained a grant of quarter sessions, nor on the other hand upon the terms of relieving the borough from the obligation of continuing to make a fair and proper contribution to the county under the new state of circumstances occasioned by the grant of quarter sessions. The word "redeem" is the word used. It is not defined in the Act. It is used in one other part of the Act (s. 70, sub-s. 1) relating to redemption of county stock. Where there is a purely unilateral obligation like tithe or land tax or loans the word "redeem" naturally involves a calculation, and probably only a calculation, of the number of years' purchase proper to convert a perpetual annual payment into a lump sum payment. "Redeem" has one meaning in connection with a financial operation of that kind, and another meaning in connection with the reopening of an arrangement by which services were rendered and a reciprocal payment more or less appropriate was made. The word "redeem" is not, in my opinion, used here in connection with a unilateral obligation so as to exclude from the arbitrator's consideration evidence to shew what will be the benefit to the county from having no longer to render those services, and what will be the continuing burden upon the county owing to expenditure and liabilities, which have been already incurred upon the assumption that the county will continue to render the services and cannot be terminated at once. The latter class of evidence was not put before the arbitrator; the former class was. I cannot see that he was wrong in receiving the evidence, and the consideration he gave to it was a matter for him.

I am therefore of opinion that the cross-appeal fails. The result is that the judgment must be varied by discharging so much of it as directs the matter to go back to the arbitrator; and we must enter judgment in accordance with the answer to question 1 in the award.

KENNEDY L.J. In this case the latter part of s. 32, sub-s. 3 (*b*), of the Local Government Act, 1888, has come into operation, Middlesbrough having become a quarter sessions borough. An arbitrator duly appointed had to consider and settle what is directed by that enactment, namely, the terms on which the newly created quarter sessions borough shall redeem the liability to the contribution which down to the time of its becoming a quarter sessions borough it had been obliged to make to the county. The arbitrator has made his award, and he has stated it in the form of a special case. He first asks the Court whether certain evidence ought to have been received and considered by him, and he awards that, if the Court should be of opinion that the evidence ought to have been received and considered, the annual sum of 337*l.* 6*s.* 11*d.* should be redeemed on payment by the borough council to the county council of 20*s.* That is a final award if the evidence was admissible. That statement in the case was made because the county council contended that evidence ought not to have been admitted as to the future saving to the county council in respect of the services referred to in the sub-section by reason of the borough having become a quarter sessions borough. The arbitrator in his second question asks the Court whether, if the evidence ought not to have been received and considered by him, the annual sum ought to be redeemed at its present value as a perpetual annuity—which was the contention of the county council—and then he states that if the Court should be of that opinion he awards that the annual sum should be redeemed on payment by the borough council to the county council of 10,379*l.* 17*s.* 5*d.* He further submitted to the Court, in deference to the wishes of the parties: "But if the Court shall be of opinion that the said evidence ought not to have been received or ought not to have been considered by me, and also that the terms on which the said annual sum shall be redeemed ought to be settled on some other basis or principle than the basis of the present value of such annual sum treated as a perpetual annuity, then the Court is requested to remit the matter to me for my reconsideration, subject to the opinion of the Court." Now, as I understand the law, it is not open to a judge of the High Court, when an award in this form is before him, and he is not of opinion that the one case in which the arbitrator states that he desires the matter to be remitted to him has arisen, to remit it. One or other of the two alternative awards is then complete, and the arbitrator, who is the judge of facts and has stated his award in the form of a special case, has made a complete award. Bailhache J. was of opinion that the evidence, to which the county council objected, was admissible and was rightly considered. He says so in terms. "I cannot assent to the contention which has in substance been put forward on behalf of the borough council that 'redemption' is equivalent to 'cessation'; but, although I do not think it is, I can well understand that in considering upon what terms redemption is to be made it is right and proper for the arbitrator to take into consideration all the facts of the case. He ought to take into consideration on the one hand the fact that the services which were rendered by the county were rendered at a loss, and on the other hand the fact that although those services will cease to be rendered to the borough it by no means follows that the county will gain to the full extent to which it lost by rendering those services. There are probably certain standing charges—salaries and expenses of that kind—which it still has to pay. It may be that it has incurred the expense in years gone by of building larger courts and perhaps larger prisons than it would otherwise have built. Those are matters which it seems to me right and proper for the arbitrator to take into consideration." (1) Therefore the learned judge was of opinion that that which was essential by the terms of the case to the remittance of the matter to him had not arisen. Perhaps this was not brought before him as clearly as it has been brought before us, but, however that may be, it is plain that the only submission by the arbitrator in the special case which would justify remitting the matter to him is a statement which makes the remitting conditional upon two things: first, that the evidence ought not to have been received or considered, and, second, that the terms on which the annual sum should be redeemed ought to be settled on some other basis or principle than the basis of the present value of such annual sum treated as a perpetual annuity. Therefore it seems to me that the order of the learned judge cannot stand. The North Riding County Council deliberately elected not to call evidence. They proceeded upon that footing throughout the arbitration, and the arbitrator made his award upon the evidence which was before him. The learned judge had no power to remit the matter to the arbitrator for his reconsideration. That decides the appeal of the borough council.

---

(1) [1913] 1 K. B. at pp. 101, 102.

There only remains the cross-appeal by the county council that the evidence is not admissible, and upon this point I desire to add very little to what has been so fully said by my Lord. I wish to express my concurrence in the view that the word "redeem" in s. 32, sub-s. 3 (*b*), of the Local Government Act, 1888, cannot mean that a lump sum must be ascertained and paid which will, upon some actuarial basis, produce an annual sum equivalent to the amount of the contribution. I should shrink from such a conclusion, because it seems to me to be impossible to suppose that, where there is to be a determination by arbitration under the Act of the terms upon which a liability shall be redeemed, that solemn proceeding is simply for the purpose of determining upon what basis that lump sum ought to be calculated. I think the words "such terms" imply, and Bailhache J. has so held, that the arbitrator is to take into consideration all relevant matters. I need not repeat what has been already said as to what is relevant, but the gain or the loss is that which the Legislature presumably intended shall be considered where, by reason of the grant of quarter sessions to a borough, a state of things has come into existence in which the borough will have to bear certain charges which it has not borne before, and the county will be relieved from certain charges in connection with the borough which up to that time it has borne. There have to be considered a number of expenses, to which Bailhache J. referred, which may have been already incurred, and which will continue to be a charge upon the county council after the borough has become a quarter sessions borough. All those questions of fact affecting the propriety of the terms of redemption are matters to be considered, and I think that the Legislature, by using the words "redeem on such terms as may be agreed upon, or, in default of agreement, may be determined by arbitration," intended that those matters should be brought into consideration. In my opinion, therefore, the conclusion which the learned judge, affirming the decision of the arbitrator, arrived at upon this point, namely, that the evidence was admissible and proper to be considered, was right, and the cross-appeal must be dismissed.

LAWRENCE J. I am of the same opinion. I think that the learned judge remitted this case to the arbitrator because, in the first place, by some inadvertence he did not give due attention to the paragraph in the award under which alone the case could be sent back to the arbitrator, and, in the next place, because he was startled at the county council calling no evidence and putting forward no case upon which the arbitrator could exercise his judgment. If he had looked carefully at the question he would have seen that, having held that the evidence was admissible, there was no power reserved in the special case to send the matter back to the arbitrator. He was bound to deal with the special case as it was submitted to him.

With regard to the other point, I fail to see how the word "redeem" necessarily imports that the liability to contribute shall be redeemed on the basis of a perpetual annuity. There seems to me to be nothing perpetual about this payment. As soon as certain relations between the borough and the county are terminated, there is to be a financial change under s. 32, sub-s. 3 (*b*). The borough is to redeem the liability to contribute to the costs of certain services rendered by the county to the borough, which services will cease upon the borough receiving a grant of quarter sessions. That liability to contribute having been created when there was an equitable adjustment of the financial relations between the borough and the county, the redemption of that liability seems to me to involve a consideration of the reciprocal benefits to and burdens upon the borough and county respectively. Some of those burdens will come to an end and others will probably continue, as, for example, the expense of building and maintaining a court-house and the payment of salaries to the officials, both of which were perhaps on a larger scale by reason of the services having to be rendered to the borough as well as to the county. These would be matters to be taken into consideration when estimating the amount which should be paid by the borough to redeem the liability to contribute. Take the case of loans raised by the county for the purposes of services to both county and borough. These loans may have years to run, and the arbitrator in fixing the sum for redemption will take the length of time during which the loans have to run into consideration. There is nothing perpetual in that. There does not therefore seem to me to be any ground for saying that the annual contribution has to be redeemed on the basis of its present value as a perpetual annuity.

Appeal allowed and cross-appeal dismissed.

Solicitors for county council: *Lowe & Co., for W. C. Trevor, Guisborough.*

Solicitors for borough council: *Torr & Co., for Preston Kitchen, Middlesbrough.*

W. F. B.

1914
April 22.

THE KING v. J. G. HAMMOND & CO., LIMITED, AND OTHERS.

Contempt of Court—Attachment—Motion for against Limited Company.

Although upon a rule calling upon a limited company to shew cause why a writ of attachment should not issue against it for contempt of Court, the Court cannot make an order of attachment, it can, where it is satisfied that a contempt has been committed, inflict the appropriate punishment, namely, order the company to pay a fine.

Rule Nisi directed to J. G. Hammond & Co., Limited, the printers of a newspaper called *Modern Society*, Modern Society (1911), Limited, the publishers of that newspaper, and Frank Harris, the managing director of Modern Society (1911), Limited, and editor of the said newspaper, calling upon them to shew cause why a writ or writs of attachment should not issue against them or any of them for their contempt in printing and publishing or causing to be printed and published in the said newspaper certain comments calculated to prejudice the fair trial at the Central Criminal Court of a certain indictment.

D. M. Hogg, for J. G. Hammond & Co., Limited, shewed cause. The present application is misconceived so far as the respondent limited companies are concerned. A limited company cannot be committed for contempt of Court: *Re Hooley, Ex parte Hooley* (1); and on such an application as this no order can be made against the company. As was laid down in the Irish case of *Rex* v. *Freeman's Journal* (2), an application for alleged contempt of Court committed by an incorporated company should be by motion, not for attachment, but to attend and answer in respect of such contempt.

C. W. Lilley, for Modern Society (1911), Limited, adopted the preceding argument.

Duke, K.C. (*McCardie* with him), in support of the rule. The rule merely brings the various respondents before the Court, and if it is then seen that imprisonment cannot be imposed, by reason of the respondents being limited companies, the Court can impose a fine.

---

(1) (1899) 79 L. T. 706.

(2) [1902] 2 I. R. 82.

D. M. Hogg in reply. It is not contended that the Court has not jurisdiction to impose a fine upon a corporation, nor is it disputed that a corporation can, on proper steps being taken, be brought before the Court to answer in respect of a contempt; but there is no case in which a corporation has been dealt with on a writ of attachment.

Darling J. We overrule this preliminary objection, but we will hear the argument on the merits before stating our reasons.

[The case was then argued on the question whether the paragraphs complained of constituted a contempt of Court, but the argument on this point calls for no report.]

Darling J. This matter comes before the Court upon a rule which was obtained against J. G. Hammond & Co., Limited, Modern Society (1911), Limited, and one Frank Harris. On behalf of the two limited companies the point has been taken that this procedure is inapplicable because the rule calls upon them to shew cause why they should not be attached for contempt of Court. The Court cannot, it is true, order a writ of attachment to issue against them and commit them to prison, for the simple reason that the officer of the Court would not be able to put his hand upon that which has no corporeal existence, but that does not prevent the Court from availing itself of the remedy which it possesses. The fact that the rule calls upon a limited company to shew cause why it should not be attached does not prevent the Court from inflicting the appropriate punishment, namely, ordering the company to pay a fine and the costs of the application. This point therefore fails.

[His Lordship then dealt with the merits. He came to the conclusion that the paragraphs in question constituted a contempt of Court, and he was of opinion that each of the respondent companies should be ordered to pay a fine and costs, the fine and costs to be levied on their goods.]

Avory and Rowlatt JJ. concurred.

Order accordingly.

Solicitors for rule: *Lewis & Lewis.*

Solicitors for J. G. Hammond & Co., Limited: *Field, Roscoe & Co.*

Solicitors for Modern Society (1911), Limited, and Harris: *Brandon & Nicholson.*

J. S. H.

1914
Feb. 27;
March 13.

SCOTT and Another, Appellants *v.* DIRECTOR OF PUBLIC PROSECUTIONS, Respondent.

Lottery—Prize Competition—Exercise of Skill—Result not depending entirely on Chance—Lotteries Act, 1823 (4 *Geo.* 4, *c.* 60), *s.* 41.

The proprietors of a newspaper published therein an advertisement of a competition for money prizes, the terms of which were that each competitor was to select one of a number of given words and compose a short sentence which defined or illustrated the word selected, the initial letter of each word in the sentence to be a letter occurring in the selected word; that all the sentences reaching the editor of the newspaper should receive careful consideration; and that the decision of the editor as to the prize-winners should be final:—

Held, that as the competition was one involving some degree of skill on the part of the competitors, and as there was no evidence that the number of competitors was so large as to make it impossible for the sentences to be considered on their merits, the competition was not one the result of which depended entirely on chance, and that it was, therefore, not a lottery within s. 41 of the Lotteries Act, 1823.

Blyth v. *Hulton* (1908) 72 J. P. 401 distinguished.

Case stated by an alderman of the city of London sitting as a Court of summary jurisdiction at the Mansion House.

An information was laid under s. 41 of the Lotteries Act, 1823 (1), against the appellant Scott for that he in the city of

---

(1) Lotteries Act, 1823 (4 Geo. 4, c. 60), s. 41: "If any person or persons shall sell any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances . . . . in any lottery or lotteries, except such as are or shall be authorized by this or by some other Act of Parliament to be sold, or shall publish any proposal or scheme for the sale of any ticket or tickets, chance or chances, share or shares of any ticket or tickets, chance or chances, except

London on April 23, 1913, did unlawfully publish a certain proposal and scheme for the sale of chances in a lottery not then authorized by any Act of Parliament, to wit, a proposal and scheme published in the issue of the *Sunday Chronicle* newspaper dated April 20, 1913, for the sale of chances in a lottery called "Bounties." An information was also laid against the appellant Woodbridge for that he did unlawfully and knowingly aid, abet, and procure the commission of the offence by Scott.

The informations were heard together and the following facts were proved or admitted. The appellant Scott was a servant in the employ of E. Hulton & Co., Limited, at their premises, 17, Tudor Street, London. On April 23, 1913, he sold at those premises to a police officer certain copies of the *Sunday Chronicle* newspaper of the issue of April 20, 1913. Woodbridge was the editor of the paper, acting in that capacity in Manchester, where the paper was published.

In the *Sunday Chronicle* for April 20, 1913, there appeared the following advertisement of a competition called "Bounties":—

"1000*l.* in prizes offered this week for *Sunday Chronicle* Bounties. First prize, 500*l.*; second prize, 100*l.*; third prize, 50*l.*; 20 prizes of 5*l.* each; 200 prizes of 1*l.*; 100 prizes of 10*s.*

"What you have to do—Choose one word from those given below:—" (Here followed a list of forty-two words.)

"Having chosen a word, think of two or three other words which, in their meaning, have some bearing on the meaning of the word chosen.

"Each of the two or three words must begin with one of the letters in the word chosen from the list, but not more than one word must begin with the same letter unless it appears more than once in the selected word. For example:—

Word Chosen.	Bounty.
Coincidence	Naturally impresses one
Reformation	Easy in theory
Servant	Appreciates respect

---

such lottery or lotteries as shall be authorized as aforesaid, ... such person or persons shall for every such offence forfeit and pay the sum of fifty pounds, and shall also be deemed a rogue and vagabond or rogues and vagabonds, and shall be punished as such in the manner hereinafter directed: . . . ."

"'Bounties' must be plainly written on the coupon. Not more than two Bounties must be written on one coupon. Each coupon must be accompanied by a postal order for 6*d.*, made payable to *Sunday Chronicle*, and crossed '& Co.' If more than one coupon is sent, one coupon for the full amount should be enclosed.

"Competitors must write their names and addresses and the date of sending the order on the back of the postal order. Friends may send as many coupons as they please in one envelope, provided sufficient postage is attached. Envelopes must be marked 'Bounties' on the top left-hand corner, and addressed *Sunday Chronicle*, Withy Grove, Manchester. All entries must reach this office not later than Thursday, April 24, 1913. Don't wait, but send in your coupons now.

"The Editor undertakes that all Bounties reaching him shall receive careful consideration, but his decision as to the prize-winners must be accepted by all competitors as final and legally binding in all respects, and entries are accepted only on this understanding.

"The Editor will not hold himself responsible for coupons lost or mislaid. The published decision may be amended by the Editor as the result of successful scrutinies. In the event of two or more competitors sending in the same winning Bounties the prize will be divided.

"Employees of E. Hulton & Co. are not allowed to compete.

"No correspondence can be entered into concerning this competition. The result of this competition will be announced in the *Sunday Chronicle* dated May 4."

The names of the prize-winners in the competition of April 20 appeared in the *Sunday Chronicle* of May 4, together with the "Bounties" which won the first three prizes. They were as follows:—

1. Undertaking: Terminates doctors' experiments.
2. Covetousness: Sickens the charitable.
3. Rapacity: Punishes itself repeatedly.

It was contended on behalf of the respondent that the appellants were upon the above evidence guilty of the offences respectively charged against them; that the competition was a

1914

SCOTT
v.
DIRECTOR
OF PUBLIC
PROSECUTIONS.

lottery within the prohibitions of s. 41 of the Lotteries Act, 1823; that the result of the competition could not in fact depend upon any skill, knowledge, or judgment on the part of the competitors; that, unless the competitions were carried on at a loss, it must be assumed that at least 40,000 coupons were sent in, as the prizes amounted to 1000*l.* and there were 40,000 sixpences in 1000*l.*; that the time allowed for the determination of the prize-winners was ten days, and that it was impossible that 4000 coupons a day could be examined or considered in accordance with the rules of the competition; that there was no standard of literary skill which could determine to which competitor in the competition a preference over any other competitors could be given. The following cases were cited:—*Hall* v. *McWilliam* (1), *Willis* v. *Young* (2), *Blyth* v. *Hulton* (3), and *Smith's Advertising Agency* v. *Leeds Laboratory Co.* (4)

On behalf of the appellants it was contended that there was no evidence upon which the appellants could be convicted or that the competition was a lottery within the Act; that there was no evidence as to the number of competitors, or that it was impossible for each competitor's solution to be considered in accordance with the rules thereof, or that the competition was one which did not involve skill or judgment or knowledge on the part of the competitors; that the rules of the competition were not shewn to have been departed from, and that they provided for a proper scrutiny of the coupons before or after the determination of the prize-winners in the competition; and that the magistrate was not entitled in law to assume without evidence that the competition was a lottery, or that the rules of the competition were not complied with, or that the prize-winners were not selected otherwise than upon a scrutiny and by the judgment of the person described as "the editor" in the advertisement, and not arbitrarily. *Hall* v. *Cox* (5) and *Taylor* v. *Smetten* (6) were cited.

The magistrate was of opinion that there was evidence before him upon which he was justified in coming to the conclusion that the competition was a lottery and that the appellants were guilty of the offences respectively charged against them. He therefore convicted them.

---

(1) (1901) 85 L. T. 239.

(2) [1907] 1 K. B. 448.

(3) 72 J. P. 401.

(4) (1910) 26 Times L. R. 335.

(5) [1899] 1 Q. B. 198.

(6) (1883) 11 Q. B. D. 207.

The question for the Court was whether upon the above facts the magistrate came to a correct determination and decision in point of law.

Gordon Hewart, K.C. (*Bodkin* with him), for the appellants. The evidence in this case is consistent with the view that the competition was a bona fide one requiring a certain degree of skill on the part of the competitors, and, that being so, the appellants ought not to have been convicted even though the evidence is equally consistent with the view that the competition depended entirely upon chance. There was no evidence as to the number of competitors, and it cannot be assumed here, as was proved to be the fact in *Blyth* v. *Hulton* (1), that the number was so great as to make a bona fide adjudication impossible. Further, there were in this case no consolation prizes, the existence of which in *Blyth* v. *Hulton* (1) was regarded as an important element for consideration. Both *Blyth* v. *Hulton* (1) and *Smith's Advertising Agency* v. *Leeds Laboratory Co.* (2) were civil cases, whereas the present case is a criminal prosecution. In a civil case it is sufficient for the plaintiff to establish facts from which the jury may reasonably draw a certain inference, and if they do draw it their verdict will not be disturbed; but in a criminal case the prosecution must satisfy the jury not only that guilt is consistent with the evidence, but that no other view is consistent with it.

Sir S. O. Buckmaster, S.-G. (*R. D. Muir* and *G. A. H. Branson* with him), for the respondent. The rules of evidence and as to onus of proof are the same in criminal as in civil proceedings. The question is, does this advertisement contain an invitation to the public to compete for prizes which are to be won simply by chance? If the answer is in the affirmative the competition is a lottery within s. 41 of the Act of 1823. Even if it be the fact, which is not admitted, that this competition calls for the exercise of some slight degree of skill by the competitors, that does not prevent the competition from being a lottery if the measure of skill is not, and cannot be, the test by which the judgment is awarded. Six classes of prizes are offered, two of which contain respectively 200 and 100 prizes. It is impossible that all the prizes could be awarded solely according to merit. Further, the advertisement does not profess that the adjudication will be based on any standard of skill. It states that all the coupons reaching the editor, not all the coupons sent in, will receive careful consideration, but it is not said that the consideration will necessarily be by the editor, or by any other one person. After the coupons have been considered, the decision of the editor is to be final. That means that the editor's adjudication may be absolutely arbitrary; he is not bound to judge by any particular standard of taste; he may award the prizes on any principle he thinks fit, or on none at all. There is in fact no standard of literary taste or merit by which the adjudication could possibly be made. In these circumstances the only possible conclusion is that the winning of a prize, particularly in the case of the 1*l.* and 10*s.* prizes, is a pure matter of chance, just as it was held to be in *Blyth* v. *Hulton* (1) and *Smith's Advertising Agency* v. *Leeds Laboratory Co.* (2) In the former case the terms of the competition were that merit was to be the sole test, but in spite of that it was pointed out by Vaughan Williams L.J. that in the circumstances an adjudication according to literary merit was impossible, and therefore the competitors must have contemplated that the winner would be selected by the arbitrary unfettered choice of the editor.

---

(1) 72 J. P. 401.

(2) 26 Times L. R. 335.

[Lush J. referred to *Barclay* v. *Pearson.* (3)]

The distinction between chance and skill as the determining factor in the award of the prize is illustrated by the case of *Hall* v. *Cox* (4), where the competitor who displayed the most skill automatically became the winner. The question whether the competitors were in the present case so numerous that a bona fide adjudication was impossible is one of fact, and there was prima facie evidence, which was not contradicted, that that was

(1) 72 J. P. 401.
(2) 26 Times L. R. 335.
(3) [1893] 2 Ch. 154.
(4) [1899] 1 Q. B. 198.

so, because 40,000 entries were required to give the newspaper a profit.

Gordon Hewart, K.C., replied.

Cur. adv. vult.

March 13. The following written judgments were delivered:—

Lush J. The appellant Scott was summarily convicted of an offence under s. 41 of the Lotteries Act, 1823. The magistrate who convicted stated a case for the opinion of the Court, and the question that we have to consider is whether, upon the facts stated in the case, the appellant was properly convicted.

The Act makes it an offence to sell tickets or chances in any unauthorized "lottery" or to publish any scheme for the sale of any such tickets. Any person who commits such offence is to be deemed a rogue and vagabond. The word "lottery" indicates clearly enough what is the offence aimed at by the statute, and the Act has been interpreted in accordance with the obvious meaning of the term as applying only to distributions of money by chance, and nothing but chance, that is, by doing that which is equivalent to drawing lots. If merit or skill plays any part in determining the distribution, there has been no lottery, and there is no offence: *Hall* v. *Cox*. (1)

What the appellant did was this. He published in his newspaper a scheme to be conducted on the following lines. The competitor was to select one of a number of words and was to compose a sentence (the initial letters being fixed by certain rules) having some appropriate bearing on the selected word. The following instances were given:—"Coincidence" (that is the selected word), and the sentence is "Naturally impresses one." "Reformation: Easy in theory." "Servant: Appreciates respect." The editor undertook to consider carefully all the sentences that reached him (this was obviously to guard against a claim by an alleged competitor who asserted that he had sent in a sentence which had been lost), but stipulated that his decision was to be final. Provision was made for a scrutiny, if necessary. Prizes were offered of amounts varying between 500*l.* (first prize) and 10*s.*, of which a large number were offered. A large number of persons competed and sent in answers, and prizes were awarded, the names of the winners being duly published. The first three answers to which the first three prizes were awarded were also published. They were as follows: 1. "Undertaking: Terminates doctors' experiments." 2. "Covetousness: Sickens the charitable." 3. "Rapacity: Punishes itself repeatedly."

---

(1) [1899] 1 Q. B. 198.

On these facts it was contended that the "competition" was a lottery; in other words, that the competitors were invited to take part, and had taken part, in a scheme for the distribution of money by chance and nothing but chance. It was contended, first, that the appellant must be taken to have contemplated that no less than 40,000 answers would be sent in, as one ought to assume that he would not carry on the competition at a loss. Second, that the time allowed for deciding as to the respective merits of the answers was so short (ten days from the sending in of the last answer) that he must have known that he could not consider all the answers. Third, that there was no standard of literary skill by which to determine to which competitor preference should be given. It was also contended that the case was concluded by two recent decisions of the Court of Appeal to which I will refer. With regard to the last contention, I do not think that it is sound, for the reasons which I will state when I come to consider the decisions. We must, I think, consider for ourselves, giving, of course, proper weight to the decisions, whether the appellant was properly convicted.

Now, a scheme may either be on the face of it a lottery, that is a scheme for distributing money according to mere chance, or if it is not, it may be shewn by extraneous evidence that the parties concerned contemplated that it would be conducted in that way. I agree with what was contended before us, that if reasonable people ought to contemplate from the facts made known to them that it would be so conducted, the scheme is none the less a lottery although on the face of it it appears not to be; and I also agree that if the appeal to skill and merit was a mere blind or cloak to cover up the true nature of the scheme, if all the sentences, for example, which would be composed under this scheme would have practically an equal chance of obtaining the prizes, one being as "appropriate" as the other, it would be just as much a distribution by mere chance as if the scheme were so described.

The Solicitor-General contended that the literary merit was of such a low order that one cannot say that one answer is "better," that is, more appropriate and more happily and neatly put together, than another. This I take to be the argument raised before the magistrate, namely, that there was no standard by which to adjudicate, in another form. The literary merit was no doubt not of a high order, and if the Lottery Act had made it an offence to distribute money prizes unless it was of a high order, it would be an important observation. But, unless one is prepared to say that no honest person can come to the conclusion that such answers as those to which the first three prizes were awarded are more pointed, more amusing, than any other answers would be—unless he must, if he expresses an honest view, say, for example, that the sentence given in the newspaper "Appreciates respect" is as appropriate a sentence for the word "Undertaking" as "Terminates doctors' experiments,"—I do not see how the poor degree of literary merit can convert the competition into a scheme for distributing money by mere chance. The answers appeal no doubt only to the taste or fancy of the person who is to adjudicate, and there was an element of chance in that sense in the competition, but that does not make the adjudication a mere determination by chance and nothing but chance. The same observation appears to me to apply to the other way of stating the contention, namely, that there was no standard by which to adjudicate.

I am aware that there is a dictum in the case of *Blyth* v. *Hulton* (1) to which I will refer in a moment which supports the Solicitor-General's argument as to this, but it was not the decision in the case and the view was expressed with regard to a different subject-matter, so that I cannot treat it as concluding my own opinion. With all respect to the dictum and to the argument, I cannot see how the absence or presence of a "standard" can convert an adjudication into a lottery or not a lottery according as the merit is of a low or a high order. Taste and fancy are as much the test in one case as in the other. I do not know that there is any standard by which one can even discriminate between the two classes of merit, and the division itself seems to break down under the same test. At all events, it appears to me that a decision according to honest taste or fancy is not a decision by chance and nothing else, however justly one may belittle the class or degree of merit. The distinction is a very plain one between a person who buys a ticket for a lottery and a person who competes even in a scheme like this. Nothing that the former does or can do can affect the result. He only awaits the result of the drawing of lots. The other invents an answer which he thinks most likely to appeal to the taste or fancy of the editor; and if the competition is honestly conducted it is what he does that determines the result. So far therefore as the scheme appears on the face of it, I am of opinion that it was not a lottery.

---

(1) 72 J. P. 401.

Now, was there any evidence on which the appellant could properly be convicted because it must have been contemplated that the scheme would be conducted as a lottery, that is, that the moneys would be distributed according to chance and nothing but chance? The prosecution relied on two assumptions, first, that the editor would not contemplate selling his paper at a loss, and, therefore, must have expected 40,000 answers; and, secondly, that, on that footing, there would be no sufficient time for him to look through and consider the answers. To convict an accused person of a criminal offence on such assumptions seems to me to be of more than doubtful propriety, but I do not see that they are well founded in fact. It is a much more probable assumption that a large number of the answers would be rejected either through not complying with the conditions or through their being so pointless in comparison with the others as not to be worth considering. But one must take the published answers into consideration, and, poor as the degree of literary merit may be, I cannot doubt that they shew that mere chance was not in fact the only determining factor. They not only do not indicate that, but they indicate the contrary. These assumptions are, I think, purely gratuitous and not founded on any real basis, and this contention also, in my opinion, fails.

It remains to consider whether we are bound by the authorities that were cited to us, namely, *Blyth* v. *Hulton* (1) and *Smith's Advertising Agency* v. *Leeds Laboratory Co.* (2) In those cases—they were civil actions—the Court of Appeal on different facts and with respect to different competitions arrived at the conclusion of fact that the parties did contemplate that the scheme would be conducted as a lottery. I have referred already to the dictum on which the Solicitor-General relied, which was not the decision of the Court, and which, again, related only to the facts of the particular case. I fail to see how a finding of fact on one set of circumstances can be said to establish a legal principle which we are bound to apply to a different set of circumstances. The decision in *Hall* v. *Cox* (3), which was also a decision by the Court of Appeal, was certainly not overruled. I do not see how, if this case could have been, and had been, tried by a jury, one could have directed them as a matter of law, because of those authorities, that the scheme was a lottery. Further, I do not think for the reasons I have given that there was any evidence on which they could properly have found that it was. It is to be observed that in the case of *Barclay* v. *Pearson* (4), which was cited by Buckley L.J. in *Blyth* v. *Hulton* (1) without disapproval, Stirling J., citing a judgment of the chief magistrate at Bow Street, apparently assented to the view that if the object of the competition was to find the most "appropriate" word, that is, most appropriate in the opinion of the editor,—which is very similar to the object of this competition—the scheme would not be a lottery.

I wish to add that I have realized that the consequences of these competitions where the sums offered are very large and the degree of skill is very small may be, and probably are, mischievous, and that in many cases the real incentive to the readers of the newspapers to take part in them is something not far removed from the spirit of gambling. It is not perhaps to be wondered at that an Act which was passed nearly 100 years ago, when the conditions were so different, is not effective to deal with this state of things. Newspapers circulate more widely now than they did then, and the competitive spirit has stimulated those who so desire to find fresh fields for their enterprise. But if a case is plain, as I think this is on these facts, such considerations cannot affect the interpretation of a statute not ambiguous in its terms. They are for the Legislature, and not for the Court.

---

(1) 72 J. P. 401.

(2) 26 Times L. R. 335.

(3) [1899] 1 Q. B. 198.

(4) [1893] 2 Ch. 154, at p. 165.

Lush J.

I think that the conviction must be quashed.

ATKIN J. The appellant in this case was prosecuted and convicted under the Lotteries Act, 1823, for unlawfully publishing a proposal and scheme for the sale of chances in a lottery not sanctioned by Act of Parliament. The proposal and scheme were contained in an issue of the *Sunday Chronicle* dated April 20, 1913, and took the form of a prize competition entitled "Bounties." In order to succeed the prosecution have to establish that the winning of a prize depends entirely upon chance. "The result no doubt depends largely upon chance but not entirely, and the cases shew that to constitute a lottery it must be a matter depending entirely upon chance": *Hall* v. *Cox* (1), per A. L. Smith L.J. This is a decision by the Court of Appeal which, as far as I am aware, has never been questioned, and is binding on us. The only evidence apart from evidence of publication produced by the prosecution was copies of issues of the *Sunday Chronicle* of April 20, 1913, containing the terms of the competition, and of May 4, 1913, containing the names of the prize-winners. The defendants called no evidence, and the question is whether there was evidence before the alderman on which he could find that the scheme was one the result of which depended entirely upon chance. It is unnecessary to read the whole of the terms, which have been referred to by Lush J., but I should call attention to the fact that, in addition to the suggestions made and the illustrations given, the terms contained at the bottom, "a full list of prize-winners in 'Bounties' No. 11 is given on page 13," and on page 13 the winning competitions there were under apparently similar conditions: First prize: "Pensioner: Enjoys prolonged existence.' Second prize: "Subterfuge: Brings temporary relief." Third prize: "Remuneration: Regulates toilers' exertions."

It was contended by the Solicitor-General that the scheme on the face of it was one that depended entirely on chance. First, it was said that the regulations nowhere stated that the prizes would be given for the best answers and that there was no criterion of merit, and that the offer was therefore merely to give prizes in accordance with chance only. It appears to me plain that reading the offer as a whole, even without the examples of prize-winning answers, and certainly with them, the offer was intended to be, and would reasonably be understood to be, an offer of prizes for the best answers. The quality of goodness would be neatness, appropriateness, truth, humour; the test of merit would be the individual taste of the editor. Apart from considerations of money prizes, if this were a proposal written out for a family game I cannot imagine its being understood in any other way.

---

(1) [1899] 1 Q. B. 198.

Secondly, it was said that even if it were an offer of prizes for the best answers, yet the competition was such as to admit of no gradation of merit at all. No literary skill, it was said, was required or could be shewn; one answer equalled another answer in inanity; and where all were equal prize-winning could depend only upon chance. I do not agree that literary skill is essential. Any kind of skill or dexterity, whether bodily or mental, in which persons can compete would prevent a scheme from being a lottery if the result depended partly upon such skill or dexterity. Many innocent puzzles or parlour games require no literary skill and yet lend themselves to competition not merely the result of chance. It seems to me impossible, having in view the conditions and taking into account the prize-winning examples, to say that no varying degrees of skill and ingenuity can be shewn or would be shewn in complying with the terms of the proposal.

Thirdly, it was said that the prizes offered amounted to 1000*l.* and that to recoup such a sum would require 40,000 entries at 6*d.* each, that the time between the last date of entry, April 24, and the day of publishing the answers, May 4, was only ten days, and that therefore the proper inference was that the answers could not in the time be examined for merit and the prizes must therefore be taken to be awarded by chance. I do not think this a legitimate inference from the facts above stated.

I see no reason for inferring that the proprietors expected or received a sufficient number of coupons with 6*d.* to recoup themselves 1000*l.* Advertisement and competition might well account for the offer. No doubt they would receive large numbers of entries. Still less do I see any reason for inferring against a person charged with a crime that he must have intended, or committed, a fraud. There seems to me no reason to suppose that many more than 40,000 answers could not have been examined in the time if a sufficient staff were brought to bear upon them. In the two cases cited to us in the Court of Appeal the actual facts had been investigated and the case did not rest on inference from the amount of the proposed prizes.

I think, therefore, that on the points urged by the prosecution there was no evidence upon which the alderman could find that the offence had been committed. I am far from saying that upon an investigation of the facts it was impossible for the scheme to be proved to have been a lottery. If, for example, it was found that in fact the prizes, or some of them, were distributed by chance I think the offence might be proved. I doubt whether it is necessary for the prosecution to prove that some or all of the competitors intended to take part in a lottery. If a man publishes a scheme which he intends to conduct as a lottery by making the prizes depend entirely upon chance, it appears to me that he might be said to publish a proposal or scheme for the sale of chances in a lottery, though they are not bought as chances. It is not, however, necessary to decide this. In my opinion in this case the copies of the newspapers alone were not evidence on which the defendants could have been convicted.

I think, therefore, the conviction should be quashed.

CHANNELL J.(1) I have had the opportunity of reading the judgments of my brothers Lush and Atkin in this case, and I concur with some reluctance in the result at which they have arrived. The competition in question seems to me within the mischief of the Lottery Acts, but the reasoning of my brothers' judgments seems to me to be quite sound. Here there is no extrinsic evidence upon which it could properly be held that the competition could not be, and could not have been intended to be, carried out according to its terms. That distinguishes the case from the case of *Blyth* v. *Hulton* (1), at least so far as the main ground is concerned upon which the Lords Justices proceeded in that case. Looking at the terms of the advertisement, although it is not stated expressly here (as it was in the advertisement the subject of *Blyth* v. *Hulton* (1)) that the prizes are to be adjudged according to merit, yet I agree that looking at it as a whole it does bear the interpretation that the prize is to be given to the most witty or epigrammatic sentence which complies with the conditions as to the initial letters of the words. That being so, the appointment of a judge, whose decision is to be final, does not make it a lottery any more than the appointment of such a judge to decide a horse race or a lawsuit makes either a lottery. I have no doubt, therefore, that so far as regards the first, second, and third prizes the competition cannot be held proved to be a lottery, but I have much more doubt so far as regards the 200 prizes of 1*l.* and the 100 prizes of 10*s.* These are very like the "consolation" prizes which Fletcher Moulton L.J. much relied on in his judgment in *Blyth* v. *Hulton* (1), but those were boldly stated to be "consolation" prizes, which does not appear to oblige the judge to decide by his idea of merit at all, and I think that the editor, who was the judge there, might according to the terms, and very likely would, give a consolation prize to a person who had frequently competed without success. Here the terms of this competition suggest that the editor can distinguish between the 203rd and the 204th competitions in order of merit, and between the 303rd and the 304th. I suspect that long before he got so far in placing his competitors he would be driven by what one of my brothers called the "inanity" of the sentences to decide by chance or even by favouritism. This, perhaps, is only suspicion. I do not myself think there is much, if any, difference between a criminal case and a civil case on such a point as this, but I think that neither in a civil case nor a criminal case is the burden of proof satisfied, or even shifted, by mere suspicion.

---

(1) The judgment of Channell J. was read by Lush J.

(1) 72 J. P. 401.

I agree that the appeal must be allowed and the conviction quashed.

Appeal allowed.

Solicitors for appellants: *R. B. Wheatly, Son & Daniel, for Cobbett, Wheeler & Cobbett, Manchester.*

Solicitor for respondent: *Director of Public Prosecutions.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.

1914

March 10.

MAYOR, &c., OF GATESHEAD *v.* LUMSDEN.

[1912 G. 987.]

Revenue—Income Tax—Expenses of Paving Street—Interest thereon—Deduction of Income Tax—" Yearly interest of money"—Gateshead Improvement Act, 1867 (30 *&* 31 *Vict. c. lxxxiii.*), *s.* 32—*Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 150, 257—*Income Tax Act*, 1853 (16 *&* 17 *Vict. c.* 34), *s.* 40.

The plaintiffs, as the urban authority of a borough, had under s. 150 of the Public Health Act, 1875, and the Gateshead Improvement Act, 1867, some years before action brought paved and made up certain streets, and had from time to time apportioned the expenses thereof among the owners of the premises fronting thereon. The defendant was the owner of premises in these streets, and the plaintiffs, under the power conferred upon them by s. 32 of the Gateshead Improvement Act, 1867, allowed him time for the repayment of the sums apportioned in respect of his premises, interest being payable thereon at the rate of 5 per cent. per annum. The defendant paid to the plaintiffs varying sums at irregular intervals in part payment of the amount due, which the plaintiffs credited in the first place to the interest due and in the second place towards payment of the principal. There was no evidence to shew that the plaintiffs made a regular practice of allowing these expenses to remain unpaid, bearing interest, as a mode of investing their funds. The defendant claimed, upon paying off the final amount due for principal and interest, to be entitled to deduct the income tax upon the amount due for interest as being "yearly interest of money" within s. 40 of the Income Tax Act, 1853:—

Held, that the interest did not come within the words "yearly interest of money" in s. 40, and that therefore the defendant was not entitled to deduct income tax therefrom.

APPEAL from the judgment of Rowlatt J. at the trial of the action without a jury.

Some years before the commencement of the action the plaintiffs, who were the urban sanitary authority for the borough of Gateshead, in the exercise of their powers under s. 150 of the Public Health Act, 1875, and under the Gateshead Improvement Act, 1867, had from time to time paved and made up various streets in the borough, which the owners of the premises fronting, adjoining, or abutting thereon had failed to pave and make up after notice duly served upon them requiring them to do so. The defendant was an owner of premises in these streets, and as such was liable to pay a proportion of the expenses thereof, and from time to time the proportion payable by him was duly settled by the plaintiffs' surveyor, and payment thereof demanded. Such apportionment had never been disputed by the defendant. Pursuant to s. 32 of the Gateshead Improvement Act, 1867 (1), the plaintiffs allowed time for payment, and pursuant to a standing resolution fixed the rate of interest thereon until payment at the rate of 5 per cent. per annum. The defendant from time to time paid to the plaintiffs various sums on account of the proportion of such expenses payable by him and interest thereon at the above-mentioned rate. The plaintiffs' accounts shewed that the defendant did not pay the instalments of principal or the interest at any fixed dates or in any fixed amounts, but paid varying amounts at irregular intervals, which amounts the plaintiffs applied in the first place to paying the interest due and in the next place towards repayment of the principal. In 1912 there remained a sum due from him on account of the said expenses and also a sum due on account of interest. Before action brought the defendant duly tendered these two sums to the plaintiffs, less the income tax on the interest, but the plaintiffs refused to accept the same as a satisfaction of the defendant's liability to them, upon the ground that the defendant was not entitled to make any deduction for income tax. This action was thereupon brought on May 22, 1912, to recover these two sums, and the defendant paid the amounts into Court less the income tax on the interest.

---

(1) 30 & 31 Vict. c. lxxxiii., s. 32: "Where any street improvement expenses are to be repaid by the owners of premises in the street, the local board may allow time for the repayment of the expenses, and may receive the same by such instalments as the local board under the circumstances think fit, with interest after such rate as the local board determine on the amount from time to time unpaid . . . ."

Rowlatt J. held that the interest on the amount of the expenses remaining from time to time unpaid was not "yearly interest of money" within the meaning of s. 40 of the Income Tax Act, 1853 (1), and that therefore the defendant was not entitled to deduct the income tax. He accordingly gave judgment for the plaintiffs.

The defendant appealed.

Ryde, K.C., and *F. Newbolt*, for the defendant. The learned judge held that the defendant was not entitled to deduct the income tax from the interest upon the authority of the decision in *Goslings* v. *Blake*. (2) In that case this Court held that interest on a loan by a banker to a customer for a fixed period less than a year was not within the words "any yearly interest of money or . . . . other annual payment" in s. 40 of the Income Tax Act, 1853, and that therefore the customer was not entitled to deduct income tax from such interest. The ground of the decision in that case was that the loan was for a specified time less than a year; as Bowen L.J. said (at p. 331), "We are dealing in this case with short loans only, that is to say, with loans made for a period short of one year, loans which are not intended to be continued, and are not continued, for a long period." In order to take the case out of the provisions of s. 40 there must be a stipulation that the loan shall not be for more than a year, and the person who relies upon that stipulation must prove it. The money here has remained unpaid for years, the interest being calculated with reference to a year, and therefore s. 40 applies. There is no fixed period under s. 32 of the Gateshead Improvement Act, 1867, during which the money is not to be called in. There is no stipulated period less than a year. Sect. 257 of the Public Health Act, 1875, makes the expenses a charge upon the premises, and if the plaintiffs had taken possession thereof under s. 33 of the local Act, and had let the premises to a tenant, the tenant could have deducted the income tax from the rent payable by him. The plaintiffs cannot be in a better position by not so proceeding. In a mortgage the loan is generally expressed to be for six months, but the loan is rarely called in at the expiration of that period; and income tax is deductible from the interest. The distinction is drawn in *Mosse* v. *Salt* (1) in this respect between short loans by bankers and mortgages. Where an annual sum is payable and nothing is said about income tax, income tax is deductible: *In re Barry's Trusts.* (2) *In re Craven's Mortgage* (3) shews that in the case of a loan which may run on beyond a year, and on which the interest is calculable by the year, income tax can be deducted from the interest. So a purchaser liable to pay interest on his purchase-money may deduct income tax from such interest: *Bebb* v. *Bunny.* (4) In that case the analogy of a mortgage was followed, and it shews that "yearly interest" in s. 40 includes interest at a fixed rate per cent. per annum though accruing de die in diem. *In re Cooper* (5) is no authority against the defendant's contention, as that case only decided that a bankruptcy notice was valid which required payment of a judgment debt and interest without deduction of income tax, there being no "yearly interest of money" within the meaning of s. 40. There the non-payment of the judgment debt was against the will of the creditor, and the interest on an unpaid judgment debt is in its nature punitive. Here the plaintiffs assented to the money remaining unpaid, and to its bearing interest at the rate of 5 per cent. per annum, and it remained outstanding for many years, though they could have called it in at any time. The course of dealing shews that it was intended that these moneys should remain outstanding at interest for a long period. The defendant is therefore entitled to deduct income tax. [*Surbiton Urban District Council* v. *Callender's Cable and Construction Co.* (1) and *Poole Corporation* v. *Bournemouth Corporation* (2) were also referred to.]

---

(1) 16 & 17 Vict. c. 34, s. 40: "Every person who shall be liable to the payment of any rent, or any yearly interest of money, or any annuity or other annual payment, either as a charge on any property or as a personal debt or obligation by virtue of any contract, whether the same shall be received or payable half-yearly or at any shorter or more distant periods, shall be entitled and is hereby authorized, on making such payment, to deduct and retain thereout the amount of the rate of duty which at the time when such payment becomes due shall be payable for every twenty shillings of such payment; and the person liable to such payment shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable; and the person to whom such payment as aforesaid is to be made shall allow such deduction, upon the receipt of the residue of such money, under pain of forfeiting the sum of 50*l*. for any refusal so to do . . . ."

(2) (1889) 23 Q. B. D. 324.

---

(1) (1863) 32 Beav. 269.

(2) [1906] 1 Ch. 768; [1906] 2 Ch. 358.

(3) [1907] 2 Ch. 448.

(4) (1854) 1 K. & J. 216.

(5) [1911] 2 K. B. 550.

Danckwerts, K.C., and *Lowenthal*, for the plaintiffs, were not called upon.

LORD SUMNER. The defendant is an owner of property in Gateshead. The plaintiffs, in the exercise of their powers as the local authority under the Public Health Act, 1875, and under the Gateshead Improvement Act, 1867, made up certain streets in which the defendant's property is situated, and have charged the defendant with his apportioned share of the expenses; and pursuant to a resolution, which is said to be a standing resolution of some years' date, they have fixed the rate of interest, under the provisions of s. 32 of their local Act of 1867, at 5 per cent. per annum. There is no dispute as to the figures.

The sole point is whether, upon payment of the agreed balance of principal and interest for which he was sued, the defendant is entitled to deduct income tax from the interest. He has to shew that he is authorized to make the deduction, and that involves shewing that he is paying "yearly interest of money" within the meaning of s. 40 of the Income Tax Act, 1853. Although the local authority have certain powers under s. 33 of the local Act to take possession of the premises which, had they exercised them, might perhaps have made their position somewhat analogous to that of a mortgagee, inasmuch as those powers were not exercised it is not necessary to consider the case from that point of view. Those powers no doubt fully secured the outstanding debt, and as it bore interest at the rate of 5 per cent. per annum it was apparently advantageous for the corporation.

It is said that the payment of interest in this case is a payment

(1) (1910) 8 L. G. R. 244.

(2) (1910) 75 J. P. 13.

C. A.
1914

GATESHEAD CORPORATION v. LUMSDEN.

Lord Sumner.

of "yearly interest of money," because it is not shewn that there was any agreement setting a short term of less than a year to the loan which in fact the defendant was enjoying. The contention is that in all cases, except where such a period is fixed by agreement between the parties, there is a payment of yearly interest of money within the meaning of s. 40 if the money remains for more than a year outstanding and interest bearing.

The facts are of the most meagre description. Accounts have been put in which shew that from time to time the defendant has paid sums of money on account of the debt due from him, in indeterminate instalments and at irregular intervals without any fixity as to their recurrence, which sums have been credited, first of all, to keeping down the current interest, and then towards paying off the principal due. There is no trace of anything more. It is suggested that the case ought to be treated, not as one of accommodation given to the frontager, but as one in which as a matter of business the local authority invest their money at interest on good security, money which they in turn very possibly borrow at a lower rate of interest. If that case was made below, which I doubt, it was not proved; and upon the materials before us I cannot infer a transaction to that effect. All that we have is the fact that there was a debt presently due, incurred on account of the expenses, and, if the local authority had chosen to enforce it, presently payable, which debt the local authority under the powers of s. 32 of the local Act did not immediately enforce and have not enforced for a substantial period of time. Sect. 32 empowers the local authority to allow time for the repayment of the expenses, and to receive payment by instalments with interest. It enables the local authority as between themselves and their auditor to justify their action. It is unnecessary to say whether the section contemplates only a formal agreement by which time is allowed and fixed and presumably regular payments are provided for, or whether it extends to an informal agreement, such as might be inferred from conduct, from which no definite time for payment and no definite instalments would be presumed. That point must be decided when it arises. All that the local authority did in this case was to give time and to receive payment by instalments, the amount of which was apparently left to the defendant, with interest at the rate fixed by the local authority under s. 32. That transaction does not appear to me to be such as to come within the principle laid down as to mortgages. We have been referred to the case of *Bebb* v. *Bunny* (1), in which Wood V.-C., after referring to the practice with regard to the deduction of income tax from interest on mortgages, held that the same rule must apply to the analogous case of interest on purchase-money. He said (at p. 219): "I cannot make any solid distinction between interest on mortgage money and interest on purchase money." As Lindley L.J. pointed out in *Goslings* v. *Blake* (2), mortgages, though in form the money may be repayable at quite a short term, usually six months, are totally different from bankers' loans for a short fixed term, such as three months, and are in point of business not short loans at all, the expressed period of repayment notwithstanding. So also Bowen L.J. said (3): "We are dealing in this case with short loans only, that is to say, with loans made for a period short of one year, loans which are not intended to be continued, and are not continued, for a long period." Whether or not the present case could have been brought into line with the mortgage cases if it had been shewn by the evidence that the corporation followed a regular practice of investing their funds by allowing time to the frontagers for payment of the principal moneys due from them with interest it is unnecessary to consider. It is sufficient for the purposes of this case to say that no such facts are shewn here. In *In re Cooper* (4), which is the most recent case on this subject, Cozens-Hardy M.R., with the concurrence of the other members of the Court, said at p. 554 that he failed to see what ground there could be for saying that the transaction there in question was one to which the language of the Income Tax Acts about "yearly interest" could fairly be applied. I do not say that the present case is concluded by the decision in *In re Cooper* (4), though I think it would be difficult to distinguish it; but applying the principle underlying that decision, I am unable to see how the words "yearly interest" can apply to this transaction. There is

(1) 1 K. & J. 216.
(2) 23 Q. B. D. 324, at p. 330.
(3) Ibid. at p. 331.
(4) [1911] 2 K. B. 550.

no agreement for a short loan or a long loan. The debt is due and repayment is not enforced; only in that sense is there a loan. Truly speaking there is simply a forbearance to put in suit the remedy for a debt. The repayment might have been enforced at any moment. The debt might have been paid by the debtor at any moment. It carried interest by law, because under s. 32 of the local Act the local authority could and did attach a rate of interest to it. The fact that the rate of interest is calculable at an annual figure is, as was pointed out in *Goslings* v. *Blake* (1), immaterial. The debt here was well secured, and the creditor, unlike the creditor in *In re Cooper* (2), did not desire immediately to enforce payment of it. The plaintiffs were no doubt to receive interest on it, but not in such a form as would apply to it the words "any yearly interest of money" in s. 40 of the Income Tax Act, 1853.

I am therefore of opinion that the burden which falls on the defendant of shewing that he has a right to make this deduction has not been discharged, and he fails in this appeal. I say nothing as to the position had he been able to shew that this was a recognized mode of investing the corporation's money at interest.

KENNEDY L.J. and LAWRENCE J. agreed.

Appeal dismissed.

Solicitors for plaintiffs: *Bell, Brodrick & Gray, for W. Swinburne, Gateshead.*

Solicitor for defendant: *Graham Gordon, for T. Lumsden, Gateshead.*

(1) 23 Q. B. D. 324

(2) [1911] 2 K. B. 550.

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.

1914
Feb. 5;
April 3.

USHER'S WILTSHIRE BREWERY, LIMITED *v.* BRUCE.

Revenue—Income Tax—Sched. D—Balance of Profits and Gains—Deductions—Brewery Business—Tied Houses—Repairs—Insurance Premiums—Loss on Rents—Legal Expenses—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2.

A brewery company, solely for the purposes and as part of their brewery business and as a necessary incident of the profitable working thereof, were the owners of licensed houses which they let to "tied" tenants, who, in consideration of the tie, paid a rent less than the full annual value. These premises were not acquired or held as investments by the company. The tenants were under agreement to repair and to pay rates and taxes, but the company in fact did the repairs and paid the rates and taxes as a matter of commercial expediency and in order to avoid loss of tenants. The company also in respect of these houses paid premiums on insurances against fire and loss of licences, and incurred certain legal expenses in connection with the renewal of the licences and other matters which did not relate to any extension of the business. In estimating the balance of the profits and gains of their business for the purposes of assessment to income tax, the company claimed to deduct their expenditure in respect of all the above matters:—

Held by the Court of Appeal, (1.), affirming the decision of Horridge J. [1914] 1 K. B. 357, that the deduction in respect of repairs to tied houses could not be allowed; and (2.), reversing the decision of Horridge J., that the deductions in respect of all the other items could not be allowed as expenses necessarily incurred for the purpose of earning the profits, and wholly and exclusively for the purposes of the trade.

Brickwood & Co. v. *Reynolds* [1898] 1 Q. B. 95 is not inconsistent with or overruled by *Smith* v. *Lion Brewery Co.* [1911] A. C. 150.

The latter case considered and explained.

Appeal from a decision of Horridge J. upon a case stated by Commissioners for General Purposes of the Income Tax Acts; reported [1914] 1 K. B. 357.

A supplemental statement of facts agreed between the parties was, by order of Horridge J., taken to be part of the case. The case and agreed statement of facts were as follows.

Usher's Wiltshire Brewery, Limited, carrying on business as brewers and maltsters and sellers of beer, wine, and spirits, appealed to Commissioners for General Purposes of the Income

C. A.
1914

USHER'S WILTSHIRE BREWERY, LIMITED v. BRUCE.

Tax Acts against an assessment of 17,383*l.* (less 401*l.* allowance for wear and tear of plant) made on them under the Income Tax Act, 1854, Sched. D, in respect of the profits of their trade. The brewery company claimed to have this assessment reduced by the following amounts:—

	£	*s.*	*d.*
(*a*) Repairs to tied houses . . .	1004	0	10
(*b*) Difference between rents of leasehold houses or Sched. A assessment of freehold houses on the one hand, and rents received from tied tenants on the other hand . . .	2134	14	6
(*c*) Fire and licence insurance premiums	90	7	6
(*d*) Rates and taxes	38	7	6
(*f*) Legal and other costs . . .	56	0	0

By the tenancy agreement, which was used in the case of all the tied houses in question, the tenant agreed to buy all liquors from the landlords and not to buy any liquors from any one else, to use the premises as a public-house only, to pay all rates and taxes, and to repair and keep in good tenantable condition the interior of the premises. In respect of the houses in question the brewery company had in fact borne the cost of the repairs themselves. They had done so because, although the legal obligation to repair was on the tenants, it was found that it was in the interests of the brewery company commercially to pay for these repairs rather than to enforce the legal obligation resting on the tenants. The cost was incurred not as a matter of charity but of commercial expediency, and was necessary in order to avoid the loss of tenants and consequent transfers, to which the licensing justices objected. Some of these repairs were to the exterior of the premises.

By clause 9 of the tenancy agreement the tenants agreed "on leaving the premises not to ask, accept, or demand any premium for the goodwill of the business."

In consideration of the "tie" contained in the tenancy agreement, the brewery company let the tied houses at considerably less than their annual value or what they could get for them without such a tie, and in the case of houses rented by them also below what they paid for the rent thereof themselves. Such letting was made by them deliberately and solely in order to get the trade which the using of such houses as tied houses afforded, and by means of so doing they were enabled to make a profit on their total trading transactions by reason of the increased sale of their beer and other goods. The letting at less than the annual value or head rent was not due to a change in the value of the premises. The figures in question represented the difference between the rents received by the brewery company on the one hand and, (i.) in the case of their freehold houses, the net Sched. A assessments; (ii.) in the case of their leasehold houses, the rents paid by them.

The insurance premiums were annual expenses incurred by the brewery company on the tied houses, in the one case to insure against destruction of or injury to the premises, i.e., the fabric, by fire, in the other to insure against loss of the publican's or beer-house licence (as the case might be) in cases where no compensation was payable out of the compensation fund. The payment of premiums for the insurance of trade premises was a usual and proper trade outgoing and was made by the brewery company as such.

The rates and taxes were paid by the brewery company in respect of some of the tied houses. In respect of the houses for which this claim arose the brewery company did not, for the reasons above stated with regard to repairs, enforce the tenants' covenants to pay and consequently paid the rates and taxes themselves.

The legal costs and expenses were solicitors' costs and disbursements paid by the brewery company in respect of the said tied houses, incurred in respect of the renewal of publicans' licences, surrenders, terminations and assignments of leases or tenancy agreements, the assessments of tied houses, obtaining a full licence, complaints against tenants, and advising as to thefts of beer. These expenses were not incurred for any extension of the business, so as to be in the nature of capital expenditure.

In common with other brewery companies the company had from time to time, in order to increase their trade, purchased licensed houses which they let to tenants, one of the terms of such lettings being that the tenants should buy from the brewery company all the ale, beer, wines and spirits sold in such tied houses.

The profits of the brewery company were made by brewing ale, beer, and other articles and purchasing spirits in bulk and selling these commodities partly to private individuals, partly (to a limited degree) to free licensed houses, and as to the greater part to the tenants of their tied houses. All these profits of the brewery company were included in the assessment. Such profits were materially increased owing to the possession by them of the tied houses in question and in consequence of an increased sale of these commodities to the tenants of those tied houses and to the fact that they were able to obtain and did obtain for the same class of goods a higher price from the tenants of their tied houses than they could obtain or were able to obtain from their other customers.

The tenants of the brewery company's tied houses did not, as a matter of fact, spend any money on repairs to the tied houses let to them. Such repairs as from time to time became necessary to these tied houses were executed by the brewery company, and it was not disputed that the sum of 1004*l.* 0*s.* 10*d.* was not an excessive sum to be expended in such repairs, including compliance with the requirements of the licensing authorities.

The tied houses in question were occupied by the tenants partly for the purposes of their trade as licensed victuallers and beer retailers, and partly as the private dwellings of themselves and their families. Repairs were executed indifferently to the trade and private dwelling parts of these houses.

The said premises had been acquired by the brewery company and were held by them solely in the course of and for the purpose of their said business and as a necessary incident to the more profitably carrying on of their said business. The possession and employment of the said premises as aforesaid were necessary to enable them to earn the profits upon which they paid income tax, and without the said premises and their uses as aforesaid the brewery company's profits, if there were any at all, would have been less in amount. Except for the purposes of and employment in their said business the brewery company would not possess the said premises. The said premises were not acquired and were not held by the brewery company as investments, and if any house lost its licence the brewery company as soon as possible got rid of it. The repairs to the said premises (in respect of which a deduction was claimed by the brewery company) were solely repairs which the brewery company were bound to do in order to maintain the said premises in a condition fit to use as licensed premises.

In addition to their tied houses, the company owned other licensed houses which they had during the year occupied by their managers or servants, and in respect of these and of the brewery and other premises occupied by the company for the purpose of their trade they had been allowed for repairs before the assessment was made the allowance to which they were entitled under the Income Tax Act, 1842, s. 100, first case, r. 3.

It was contended on behalf of the company: (*a*) That, having regard to the decision in *Smith* v. *Lion Brewery Co.* (1), the deductions claimed ought to be allowed. (*b*) That the licensed premises of which they were the owners and lessees had been acquired by them and were held by them in the course of and for the purpose of their said business and as a necessary incident to the more profitable carrying on of such business, and that the purchase and letting of licensed houses formed an essential part of their business as brewers. (*c*) That in consideration of the tenants of their tied houses covenanting to buy all ales, beer, wines and spirits from the company only, those tenants paid a much less rent than the full annual value of the premises. (*d*) That by these means and the possession and use of the premises which were employed by the company as substantially necessary to carry on their business profitably the company were enabled to earn and did earn profits upon which they paid income tax, and which without the said premises and their user for the purposes aforesaid would have been less in amount. That the company had not acquired the premises as investments or for the purposes of investment. (*e*) That the repairs in question were a necessary outlay without which such profits could not have been earned, and that these

(1) [1911] A. C. 150.

C. A.
1914

USHER'S WILTSHIRE BREWERY, LIMITED v. BRUCE.

formed a legitimate deduction in arriving at the total gains in respect of which they were assessed under Sched. D. (*f*) That they were properly entitled to a deduction from their profits by their assessment under Sched. D in respect of the difference between the rents of leasehold houses or Sched. A assessment of freehold houses on the one hand, and rents received from their tenants of tied houses on the other hand. (*g*) That they were entitled to the above-named deductions for fire and licence insurance premiums, for rates and taxes, and for legal and other costs as necessary expenses in the conduct of their business, without which their profits as assessed under Sched. D could not have been earned.

The surveyor of taxes on the other hand contended: (*a*) That the trade of the brewery was quite distinct from the trade of the public-house and that the expenses incurred in respect of the public-house could not be deducted from the profits of the brewery, and that so far as the deduction for repairs was concerned the Commissioners were bound by the decision in *Brickwood & Co.* v. *Reynolds* (1) in the Court of Appeal. (*b*) That there was no authority for the deductions (*b*), (*c*), (*d*) and (*f*), claimed by the brewery company as set forth above, on the ground that the decision as to repairs to tied houses covered these deductions by analogy. (*c*) That in estimating the balance of the profits and gains these sums should not be set against or deducted from such profits and gains, as being money wholly and exclusively laid out or expended for the purpose of such trade, and that with regard to the deductions sought under these heads also it was necessary to differentiate between the trade of the brewery and the trade of the public-house, and finally that these deductions were not authorized by the third rule of the first case, s. 100, Income Tax Act, 1842.

The Commissioners decided that the brewery company were not entitled to any of the deductions claimed.

On appeal from that decision Horridge J. held (1.), following *Brickwood & Co.* v. *Reynolds* (1), that the deduction in respect of the repairs to the tied houses could not be allowed; and (2.) that the deductions in respect of all the

(1) [1898] 1 Q. B. 95.

other items must be allowed as expenses necessarily incurred for the purpose of earning the profits, and wholly and exclusively for the purposes of the trade.

From the first part of that decision the brewery company appealed; and there was a cross-appeal by the Crown against the latter part of the decision.

Ryde, K.C., and *Latter*, for the appellants. The expenses incurred by the appellants in respect of the repairs to the tied houses must be deducted in order to ascertain the balance of profits and gains of their business as brewers. These expenses were wholly and exclusively laid out or expended for the purposes of their trade.

Brickwood & Co. v. *Reynolds* (1) was overruled by *Smith* v. *Lion Brewery Co.* (2)

The point is put very clearly by Channell J. in his judgment in *Smith* v. *Lion Brewery Co.* (3)

The principle was adopted by the Court of Appeal in the same case. (4) Mutatis mutandis that principle applies here, namely, that if a brewer by the now familiar process of having tied houses increases his sales of beer, and therefore his profits, the expenses of repairing those houses are incurred wholly and exclusively for the purpose of his trade, and ought therefore to be deducted in arriving at the annual profits of his business. If the tenant did the repairs and the brewery company allowed a discount off the price of the beer, in that case the cost of the repairs would inevitably be deducted. The form of the transaction can make no difference in principle. The repairs must be effected by the brewer in order to earn the profits.

[COZENS-HARDY M.R. I do not think *Brickwood & Co.* v. *Reynolds* (1) was overruled by the House of Lords in *Smith* v. *Lion Brewery Co.* (2)]

The question what is really necessary to earn the profits is a question of fact which the Commissioners have found in favour of the appellants: *Moore* v. *Stewarts & Lloyds*. (5)

(1) [1898] 1 Q. B. 95.
(2) [1911] A. C. 150.
(3) [1909] 1 K. B. 711, 718.
(4) [1909] 2 K. B. 912.
(5) (1906) 43 Sc. L. R. 811.

Horridge J. thought he was bound by *Brickwood & Co.* v. *Reynolds.* (1) In respect of the deduction for repairs it is submitted he was wrong. [They also referred to *Beamish* v. *Beamish* (2) and *Russell* v. *Town and County Bank.* (3)]

Sir John Simon, A.-G., Sir S. O. Buckmaster, S.-G., and *W. Finlay,* for the Crown. It was decided past all controversy in *Brickwood & Co.* v. *Reynolds* (1) that repairs to premises not occupied by the person assessed cannot be deducted, and that case is binding on this Court. It was distinguished in *Smith* v. *Lion Brewery Co.* (4) If *Brickwood & Co.* v. *Reynolds* (1) be good law it concludes this case; and it is submitted that it is good law. The present case is even stronger, because here the tenants have covenanted to repair, and in *Brickwood & Co.* v. *Reynolds* (1) they had not.

[Upon this point they were stopped.]

Upon the cross-appeal, with regard to the claim to deduct the difference between rents received and the full annual value it is material to consider the operation of Sched. A. In the case of a house assessed under Sched. A at 50*l.* and let by the brewer to a tied tenant at 30*l.*, the tenant, who is the occupier, pays the tax, say at 1*s.* in the pound, amounting to 50*s.*, but he is only entitled to deduct income tax on 30*l.* He pays the tax, therefore, on 20*l.*, and the landlord on 30*l.* When the tenant is assessed under Sched. D he is entitled to deduct the full 50*l.* Under those circumstances the brewers cannot be entitled to deduct the difference over again: *Gillatt & Watts* v. *Colquhoun* (5); *Russell* v. *Town and County Bank.* (3) The fact that the brewers do not get the rack rent does not entitle them to deduct the difference. [They also referred to *Wylie* v. *Eccott.* (6)]

The outlay incurred in respect of insurance premiums was not wholly and exclusively incurred for the purposes of the company's trade: see the judgment of Channell J. in *Smith* v. *Lion Brewery Co.* (7)

With reference to the claim to deduct the legal expenses,

---

(1) [1898] 1 Q. B. 95.

(2) (1859) 9 H. L. Cas. 274, 338.

(3) (1888) 13 App. Cas. 418.

(4) [1911] A. C. 150.

(5) (1884) 2 Tax Cases, 76.

(6) (1912) 6 Tax Cases, 128.

(7) [1909] 1 K. B. 721.

C. A.
1914

USHER'S WILTSHIRE BREWERY, LIMITED *v.* BRUCE.

Southwell v. *Savill Brothers* (1) shews that that cannot be supported.

Ryde, K.C., for the respondents on the cross-appeal. All expenses incurred by the trader in order to earn his profits may be deducted: *Guest, Keen & Nettlefolds* v. *Fowler.* (2) The sacrifice of rent which enables the increased profits to be earned may properly be deducted. If it be found as a fact that the expenses do enable the profits to be earned, then the trader is entitled to deduct the amount of the expenses. In *Gillatt & Watts* v. *Colquhoun* (3) this point did not arise. There there was a loss of capital. In *Southwell* v. *Savill Brothers* (1) Phillimore J. said the point as to legal expenses did not arise. The decision does not touch the present case, and the dictum of Phillimore J. supports the respondents' contention. They rely also on what Lord Herschell said in *Russell* v. *Town and County Bank.* (4) Argument based upon Sched. A is misleading. The subject-matter of taxation under that schedule is wholly different. Even if the deduction is allowed twice over, that is immaterial. The tax is a personal one, and A. is not prejudiced in his right to deduct merely because B. is also entitled to make the deduction.

Sir John Simon, A.-G., in reply. *Smith* v. *Lion Brewery Co.* (5) only decided that where there are particular expenses which the brewer must pay in order to carry on the tied house business, those expenses may be deducted. Lords Halsbury, Atkinson, and Shaw all base their judgments upon the fact that the expenditure was obligatory. The decision in *Brickwood & Co.* v. *Reynolds* (6) is not affected by that case.

Cur. adv. vult.

COZENS-HARDY M.R. The President will read the judgment of the Court. (7)

SIR SAMUEL EVANS, PRESIDENT. In this case the questions which arise on the appeal and cross-appeal relate to deductions which the brewery company claim to be entitled to make from the profits or gains of their trade or business of brewers and maltsters and sellers of beer, wine, and spirits, for the purpose of assessment to the income tax under Sched. D.

---

(1) [1901] 2 K. B. 349.

(2) [1910] 1 K. B. 713.

(3) 2 Tax Cases, 76.

(4) 13 App. Cas. 418, 424.

(5) [1911] A. C. 150.

(6) [1898] 1 Q. B. 95.

(7) Cozens-Hardy M.R., Sir Samuel Evans, President, and Joyce J.

The facts are set out in the case stated by Commissioners for General Purposes of the Income Tax Acts for the Tax Division of Trowbridge, under 43 & 44 Vict. c. 19, s. 59, for the opinion of the King's Bench Division of the High Court, as amplified by a supplemental statement of facts agreed by the parties in pursuance of an order dated July 29, 1913. These two documents therefore constitute the case stated, and are hereinafter so referred to.

The deductions claimed are ranged under five heads in the case stated, and designated by the letters (*a*), (*b*), (*c*), (*d*) and (*f*).

The deductions all relate to licensed premises which are known as "tied houses" owned by the brewery company, some of them being their freehold property, and others leasehold property; and all the tied houses are let to, and are in the occupation of, persons who are tenants of the brewery company. A form in blank of the tenancy agreements is exhibited to and forms part of the case. It is stated in the case that the tied houses are occupied by the tenants partly for the purposes of their trade as licensed victuallers and beer retailers, and partly as the private dwellings of themselves and their families. It is also stated that "the houses have been acquired by the brewery company, and are held by them solely in the course of and for the purpose of their business, and as a necessary incident to the more profitable carrying on of their business; the possession and employment of the said premises are necessary to enable them to earn the profits upon which they pay income tax, and without the said premises and their use the company's profits, if there were any at all, would be less in amount; and except for the purposes of and employment in their said business the company would not possess the said premises; and the said premises were not acquired and are not held by the company as investments; and if any house loses its licence, the company as soon as possible get rid of it."

The common ground upon which the company claim to be entitled to have the various deductions made from their gains and profits is that they are disbursements or expenses in money wholly and exclusively laid out or expended for the purposes of their trade or concern; and are therefore not prohibited or disallowed by the first or third rule of the first case, or the first rule applicable to the first and second cases under s. 100, or the 159th section of the Income Tax Act, 1842. The principles and tests to be applied in order to determine the legality of the various deductions claimed are the same; but it will be convenient to deal with each head separately.

It was contended with reference to all the heads that it was found, and stated as a fact in the case, that they were disbursements or expenses wholly and exclusively laid out or expended for the purposes of the company's trade or concern in respect of the profits or gains of which they were assessed. We see no such finding or statement in the case. But even if there were such a statement, that would by no means settle the question to be determined. When the various circumstances and facts upon which the question depends are established and found, the proper inference to be drawn in order to determine whether the disbursements or expenses were wholly and exclusively laid out for the purposes of the trade or concern within the meaning of the provisions referred to is a question of law. An analogous example of such a question—and one very familiar to this Court—is that which constantly arises under the Workmen's Compensation Act, where an arbitrator or county court judge has found all the material facts relating to an accident to a workman and this Court has on appeal to determine as a matter of law whether in those facts the accident arose "out of or in the course of the employment." This point was recently dealt with by Cozens-Hardy M.R. in *Gane* v. *Norton Hill Colliery Co.* (1) My Lord said at p. 542: "I hope that I shall never depart from the fundamental rule that the learned county court judge is the tribunal to find the facts; but when, as in the present case, the facts are all found or admitted, then the only question which came before the county court judge was this: what is the true inference to be drawn from these known facts? . . . . I am

(1) [1909] 2 K. B. 539.

clearly of opinion that it is open to us in a case like this, where the facts are not in dispute, where they have all been found by the tribunal dealing with the facts, to say that the inference which the judge drew from those facts and the conclusion at which he arrived on those facts are wrong in point of law. We sometimes say the judge has misdirected himself; but if the learned judge draws from the admitted facts a wrong conclusion in point of law, I care not whether you call it misdirection or not, that is a decision which is open to review in this Court."

We now proceed to deal with the facts and contentions pertinent to the present appeal.

The first head of deductions claimed is: "(*a*) Repairs to tied houses 1004*l.* 0*s.* 10*d.*"

These repairs were "executed indifferently to the trade and private dwelling parts of these houses." They are also described in the case as "solely repairs which the company were bound to do in order to maintain the said premises in a condition fit to use as licensed premises."

By their agreements the tenants covenanted to do these repairs themselves; but the cost of the repairs was in fact borne by the company "because, although the legal obligation to repair was on the tenants, it was found that it was in the interests of the company commercially to pay for these repairs rather than to enforce the legal obligation resting on the tenants. The cost was incurred not as a matter of charity but of commercial expediency, and was necessary in order to avoid the loss of tenants and consequent transfers to which the licensing justices object."

Upon this head Horridge J. decided against the company, holding that he was bound by the decision of this Court in *Brickwood & Co.* v. *Reynolds.* (1) It was contended before us that that case was inconsistent with the case of *Smith* v. *Lion Brewery Co.* (2), and ought to be regarded as of no authority. It is clear, however, that the former case was neither overruled nor disapproved of in the latter. On the contrary, it was treated as being a subsisting authority on the point which it decided. It is therefore binding upon this Court also. Further, we think the decision rested on sound principles. The case now before us is not distinguished upon the deductions claimed under head (*a*) from *Brickwood & Co.* v. *Reynolds* (1); indeed the present is an a fortiori case. The deduction claimed in respect of the repairs accordingly is not allowable; and the appeal of the company upon this head must be dismissed.

---

(1) [1898] 1 Q. B. 95.

(2) [1911] A. C. 150.

The next head of deductions claimed is: "(*b*) Difference between rents of leasehold houses or Sched. A assessment of freehold houses on the one hand, and rents received from tied tenants on the other hand, 2134*l.* 14*s.* 6*d.*"

The learned judge in the Court below decided in favour of the brewery company that these deductions (and also those under (*c*), (*d*) and (*f*)) should be allowed, mainly on the authority of *Smith* v. *Lion Brewery Co.* (2); and against this part of the judgment the Crown bring their cross-appeal. The case of *Smith* v. *Lion Brewery Co.* (2) in its progress through the Courts disclosed a remarkable divergence of judicial opinion. Channell J., Kennedy L.J., Lord Loreburn L.C., and Lord Shaw of Dunfermline took one view; Sir H. Cozens-Hardy M.R., Farwell L.J., Lord Halsbury, and Lord Atkinson held the other; and the latter view prevailed. It is necessary to point out what was the actual decision. Whatever assistance may be derived from the various judgments and opinions expressed, the point decided was a definite and narrow one. It was that a brewery company are entitled before arriving at their assessable profits to deduct the portion of the compensation levy paid by them, on the ground that it is a statutory imposition upon them in respect of their interest in the licensed premises, and made payable by legal enactment as a condition of the use of the premises for the sale of intoxicating liquors. One of the learned Law Lords likened this compensation levy to the licence duty paid "by a publican, or a pawnbroker, or an auctioneer, to entitle him to carry on his trade or business": Lord Atkinson. (3) In this illustration the learned Law Lord followed the line of reasoning which was initiated by Cozens-Hardy M.R. in the Court of Appeal in the same case (4), where first of all with reference to a tenant he says at p. 918: "His position is identical with that of an auctioneer, or a pawnbroker, or a solicitor, each of whom has to make an annual payment to Government before he can earn, and as a condition of earning, the profits in respect of which he is chargeable under Sched. D. It is a matter of no importance to consider how the amount thus paid is applied." And this is made applicable to the case of the brewery company in this passage at p. 919: "It seems to me that every argument which goes to shew that the retail seller of beer can deduct what he pays in respect of the compensation levy, applies with equal force in favour of the wholesale seller of beer in respect of what he pays as his proportion of the compensation levy." The decision in *Smith* v. *Lion Brewery Co.* (1) therefore does not determine the questions which remain to be considered in the present case.

---

(1) [1898] 1 Q. B. 95.

(2) [1911] A. C. 150.

(3) [1911] A. C. at p. 161.

(4) [1909] 2 K. B. 912.

The Income Tax Acts disallow all deductions under the Sched. D assessments other than those expressly "enumerated" in the Act. The "enumeration" (implied rather than expressed) in the first rule applicable to cases 1 and 2 already referred to comprises "Disbursements or expenses being money wholly and exclusively laid out or expended for the purposes of the trade or concern."

Are the sums (amounting to the total of 2134*l.* 14*s.* 6*d.*) representing the "difference between rents of leasehold houses, or Sched. A assessment of freehold houses on the one hand, and rents received from the tied tenants on the other hand," such disbursements or expenses?

They appear to us to be more accurately described as losses of rents or annual values, or allowances out of rents or annual values, of freehold and leasehold properties than as such disbursements or expenses as aforesaid.

The rents or Sched. A assessments of these properties do not come into or form part of the trade profits of the brewery company at all; how therefore can sums by which the rents are reduced, or allowances made out of such rents, or any sums representing the difference between rents received, and Sched. A assessments, be properly brought in as debits against such trade profits?

---

(1) [1911] A. C. 150.

The motives and objects of the company in acquiring the tied houses are described in the special case, and have been referred to.

The case further states that, in consideration of the "tie" contained in the tenancy agreements, the company let the tied houses at considerably less than their annual value, or what they could get for them without such a tie, and in the case of houses rented by themselves below what they pay for the rent thereof themselves; and proceeds: "Such letting is made by them deliberately and solely in order to get the trade which the using of such houses as tied houses affords, and by means of so doing they are enabled to make a profit on their total trading transactions by reason of the increased sale of their beer and other goods. The letting at less than the annual value or head rent is not due to a change in the value of the premises. The figures in question represent the difference between the rents received by the company on the one hand and, (i.) in the case of their freehold houses, the net Sched. A assessments; (ii.) in the case of their leasehold houses, the rents paid by them."

The claim of the company assumes that they are entitled when they have become the owners of these properties to a sort of insurance that they will never receive from their tenants less than what is placed as the annual value in the Sched. A assessments of such of the properties as they own as freeholders or than the head rents paid by them for such of the properties as they own as leaseholders.

They may for various reasons be content to take a smaller percentage upon the capital invested in the acquisition of the properties; for example, for the sake of keeping good and contented tenants, or for the sake of increasing the goodwill of the licensed premises, and thus enhancing their capital value, as well as for increasing their sale of liquors. As before stated, these deductions in rent do not appear to us to come properly within the description of such disbursements or expenses. But assuming (contrary to our view) that agreements to accept these lower rents answer the description of disbursements or expenses: in our opinion they are not laid out or expended wholly or exclusively for the purposes of the trade or business of the company.

C. A.
1914

USHER'S WILTSHIRE BREWERY, LIMITED v. BRUCE.

They are laid out or expended in part to increase the profits of the tenants' trade, because presumably the greater the " barrelage " (as the sale and consumption of liquor in the house is described) the larger the profits of the licence-holder ; unquestionably they are laid out in part also to maintain or increase the value of the goodwill of the business, and the greater the value of the goodwill the greater also will be the capital value of the licensed premises owned by the company. Suppose that by the increase of the trade the rents received exceeded the Sched. A assessments or head rents, the excess would not be brought in to swell the profits of the trade, as the rents do not come into the trade accounts at all.

It might very well happen that, in order to increase the attraction and business and value of a licensed house, the company might let it at a peppercorn or merely nominal rent to a particular tenant, for example, a well-known entertainer, or a friend of crowds of athletes or their admirers, or a person of great influence amongst friendly societies, or associations of various kinds. This might be done either by means of a " tie " or without any " tie " or agreement to sell and buy at higher prices than the ordinary, but merely in the hope or expectation that the tenant would buy largely from the company, and thus not only help their profits, but create a valuable goodwill. It is difficult to conceive that it would be legitimate in such a case to deduct the whole annual value or Sched. A assessment of the premises from the profits of the company, on the ground that it was such a disbursement or expense as has been described.

It is significant that by clause 9 of the tenancy agreement the tenants " agree on leaving the premises not to ask, accept, or demand any premium for the goodwill of the business.'

The truth is that whatever the object or motives of business proprietors like the company in this case may be in acquiring properties like these houses which they do not themselves occupy, and whatever losses or gains they may sustain or enjoy either in capital or in income in respect of such properties (which are properly assessable under Sched. A), they cannot and ought not to be brought into the account of their trade profits or losses for the purposes of Sched. D.

A curious practical result, which could never have been intended, would seem to follow the making of these deductions. The policy of the Income Tax Acts is that all these properties must bear their proper income tax, as lands, tenements, or hereditaments, according to their annual values in accordance with Sched. A. If a house is of the annual value of 60*l.* and is let at that rent, income tax is levied on that sum, and is payable in the first instance by the tenant. He is then entitled to deduct it from the next rent payable to the company. If the house is let at a reduced rent of 30*l.* on account of the "tie," the tenant can only deduct income tax on 30*l.*; he therefore pays on 30*l.*, and the company on 30*l.* only. If the tenant is assessed under Sched. D he is entitled to deduct the full 60*l.* So far as the occupier is concerned, therefore, the whole tax disappears. The company as landlords in the case supposed have borne the tax on 30*l.* If they in turn can also deduct 30*l.* from their profits, the income tax on the property again disappears. In this way if the company's claim for deductions is allowed, property of the value of 2134*l.* would seem to escape the tax altogether and produce nothing.

The Court is of opinion that the deductions amounting to 2134*l.* 14*s.* 6*d.* are not deductions which the Act allows, and the appeal of the Crown upon this head succeeds.

The next head is: "(*c*) Fire and licence insurance premiums 90*l.* 7*s.* 6*d.*"

The fire insurance premiums are paid to insure against destruction of or injury to the fabric of the premises. Fire insurance premiums can properly be deducted by occupiers or landlords under Sched. A. These are no doubt in one sense disbursements or expenses. The question is whether they are wholly and exclusively laid out or expended for the purposes of the company's trade or business, so that they are legitimate deductions under Sched. D. We are of opinion that they are not. They are paid to insure "the fabrics"; to protect the landlords from loss by destruction of their property. Thus, indirectly the rent or income derivable from the property may also be insured against loss. The fire policies are not effected for the purpose of insuring against the loss of the trade enjoyed by the company in connection with the premises; certainly not exclusively for that purpose. And it is only very indirectly that the payment of fire insurance premiums can possibly be said to affect or protect the trade carried on on the premises. What is insured against is the destruction by fire of the houses. In most cases no doubt houses which are licensed are of greater value with the licence attached than without a licence; but cases have been known where compensation was claimed under the Licensing Act, 1904, in which it was established that the premises were worth more as private properties without a licence. (See *Lassells and Sharman, Ld., In re the Freemasons' Arms* (1).)

The passage from Lord Atkinson's judgment which was cited by Horridge J. referred to insurances effected by the publican himself to protect his business, and not to protect "the fabric, in which he may have little or no interest." In any case that passage is no more than a dictum, and was no part of the decision. As to the licence insurance premiums, these are paid "to insure against loss of the licence in cases where no compensation is payable out of the compensation fund." They are again payable in the main, if not wholly, to protect the company as owners of the property from any diminution of the value of the houses in the event of the licences being taken away without any right to compensation. Where such a case arises, the trade in such a house has disappeared, and the brewery company are converted into owners of private property, now assumed to be of diminished value, with a capital sum of money which they have received under the policy. This sum recompenses them for the diminution of the value of the property. It is not brought in to swell the profits of the company as traders under Sched. D, although it represents, in the business of insurance, the capital value of annual payments of premiums which the company claim to deduct as expenses.

The Court is of opinion that neither the fire insurance premiums, nor the licence insurance premiums, are deductions which can legally be made.

Under this head, accordingly, the appeal of the Crown also succeeds.

---

(1) (1908) 72 J. P. 323.

The next head is: "(*d*) Rates and taxes 38*l.* 7*s.* 6*d.*" These are sums which the tenants were under a legal obligation to pay pursuant to their covenant in the tenancy agreement. The company, however, did not, for reasons satisfactory to them, enforce the tenants' covenants to pay, and consequently paid the rates and taxes themselves. These reasons have been stated and appear in the case, and need not be repeated: in brief, they are commercial interest and expediency, and avoidance of inconvenience.

The Court is of opinion that these rates and taxes so paid are in no sense deductions which are allowable from the company's profits.

Under this head therefore the appeal of the Crown succeeds also.

The last head is: "(*f*) Legal and other costs 56*l.*" It is not easy to understand all these items. Clearly as to some of them, they are not disbursements made wholly and exclusively for the purposes of the company's trade. And we do not see how the others can be such disbursements. These items are in some way connected with the licensed premises owned by the company or with their tenants' conduct or position, and are thus incidentally connected with the trade of the company; but we do not think it has been shewn that any of them are wholly or exclusively incurred for the purpose of the trade of the brewers; and they cannot therefore be deducted.

Upon this head the appeal of the Crown also succeeds.

In the result the appeal of the company is dismissed, with costs here and below; and the cross-appeal of the Crown is allowed, with costs here and below.

Appeal dismissed. Cross-appeal allowed.

Solicitors for appellants: *Godden, Holme & Ward.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

G. A. S.

1914
March 10.

In re NEAL.
Ex parte THE TRUSTEE.

Bankruptcy—Mortgage of Book Debts—Receiver—Bankruptcy of Mortgagor—Notice of Assignment—Order and Disposition—Consent of True Owner—Debts due or growing due—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 44, *sub-s.* 2 (*iii.*).

On November 29, 1913, mortgagees of the book debts of a business appointed a receiver. Negotiations at once ensued between the mortgagor and the mortgagees, the mortgagor desiring that the receiver should not give notice to the book debtors, and the mortgagees insisting on their appointment of the receiver. On December 15 the negotiations fell through, and on December 16 the receiver arranged with the mortgagor to take possession of the business the next day and instructed the mortgagor's clerk to give notice to the book debtors, which he did not do. On December 17 the receiver had notice of an act of bankruptcy committed that day by the mortgagor, and on December 29 the mortgagor was adjudged bankrupt on his own petition. Between December 22 and 29 the receiver gave notice to the book debtors:—

Held, that the book debts were at the commencement of the bankruptcy (December 17) in the order and disposition of the bankrupt with the consent of the true owners, for that the receiver could have given notice between November 29 and December 17 to the book debtors.

Rutter v. *Everett* [1895] 2 Ch. 872 discussed.

This was an application that raised the question whether the book debts of the debtor's business, which were comprised in a mortgage, were in the order and disposition of the debtor at the commencement of his bankruptcy with the consent of the true owner, in these circumstances.

The debtor carried on the business of an artistic decorator, and by an indenture of mortgage made November 13, 1909, between the debtor as mortgagor of the one part and one Thomas Sneath as mortgagee of the other part, the mortgagor as beneficial owner conveyed (inter alia) to the mortgagee his leasehold business premises at 77, Mortimer Street, St. Marylebone, and also "all sums now due or that may hereafter become due to the mortgagor in connection with his said business," and also all the beneficial interest and goodwill and connection of the mortgagor in his said trade or business, and also the full benefit of all contracts and engagements entered into or which should during the continuance of the security be entered into by or with the mortgagor in respect of his said business, subject to redemption on the repayment with interest of the sum of 500*l*. then advanced by the mortgagee to the mortgagor.

In November, 1910, the mortgagee died.

On November 27, 1913, the executors of the mortgagee issued a writ in the King's Bench Division of the High Court against the debtor for the principal and interest due under the mortgage; and on November 29 they, in exercise of their powers under the Conveyancing Act, 1881, appointed one Warr receiver of all the property comprised in the mortgage. Warr did not at once take possession as receiver because negotiations commenced on the 3rd and continued until the 15th of December between the solicitors of the debtor and of the mortgagees with a view to an arrangement, the debtor being most desirous that notice of Warr's appointment as receiver should not be given to the book debtors of the business, while the mortgagees insisted that Warr's appointment as receiver should stand as one of the terms of the proposed arrangement. On December 15 the negotiations fell through, and on December 16 Warr called at the debtor's business premises and arranged with him to meet him there the next morning to receive possession of the business, and at the same time Warr instructed the bookkeeper of the business to send out notice to all the book debtors of the business of his appointment as receiver, which, however, the bookkeeper did not do.

The next morning, December 17, Warr called at the business premises and remained there until midday, but the debtor did not attend. At midday he went out to lunch, and on returning at 2.30 P.M. found one Corp in possession of the premises and business, who excluded him and claimed to retain possession as trustee under a deed of arrangement for the benefit of creditors executed that morning by the debtor. Between December 17 and 19 Corp gave notice of his trusteeship to all the book debtors of the business.

On December 19 the mortgagees signed judgment in their King's Bench action for their principal, interest, and costs, and the same day they issued a foreclosure summons against the debtor

1914

NEAL, *In re.* THE TRUSTEE, *Ex parte.*

in the Chancery Division, and on December 20 they obtained the appointment of Warr as receiver and manager of the business until January 16, 1914. On December 22 Warr took possession under the order and proceeded to collect debts and execute contracts, and between December 22 and 29 he gave notice of his appointment as receiver under the order to all the book debtors of the business.

On December 29, 1913, the debtor presented his own petition in bankruptcy. A receiving order was made the same day and adjudication followed. The trustee in bankruptcy served Warr with a notice of motion claiming (1.) a declaration that the book and other debts comprised in the mortgage of November 13, 1913, were in the order and disposition of the bankrupt at the commencement of the bankruptcy within sub-s. 2 (iii.) of s. 44 of the Bankruptcy Act, 1883, and formed part of the property of the bankrupt divisible amongst his creditors; and (2.) a declaration that the moneys earned on works in progress at the commencement of the bankruptcy formed part of the property of the bankrupt divisible among his creditors.

E. W. Hansell, for the motion. The appointment of Warr as receiver on November 29 did not take the book debts out of the order and disposition of the debtor and determine the consent of the true owners, the mortgagees. Notice should have been given to the book debtors: *In re Tillett* (1); *Rutter* v. *Everett.* (2) If notice had been given before December 17, there would have been a protected transaction within s. 49. But the title of the trustee in bankruptcy relates back to the act of bankruptcy committed on that date, and there had been no withdrawal of consent before that day. Therefore the title of the trustee is paramount.

G. H. Devonshire, for the mortgagees. It is not disputed that an assignee of book debts must give notice to the book debtors in order to perfect his title. But this case falls within the exception stated in the head-note to *Rutter* v. *Everett* (2) that "although, from the absence of notice, consent on the part of the true owner to a debt remaining in the order and disposition of a bankrupt is prima facie to be inferred, the inference may be

(1) (1889) 6 Morr. 70.

(2) [1895] 2 Ch. 872.

rebutted if the true owner takes every possible step to obtain possession of the debt, or if his failure to obtain possession is not attributable to his own fault." That statement is based on the observations of Stirling J. in his judgment in that case at pp. 879, 881. In that case no notice of the assignment was ever given to the book debtors. Here, the appointment of Warr as receiver on November 29 was a demand for possession and the first step towards taking the book debts out of the order and disposition of the mortgagor, and he at once negotiated for some compromise. The correspondence shews that from December 5 to 15 the mortgagor was doing all he could to prevent the receivership being put in force while the mortgagees were insisting that their appointment of Mr. Warr should stand. Then when the negotiations fell through and the receiver went to take possession he was improperly excluded, and his attempt to give notice was defeated by the bankrupt's breach of good faith and that of his bookkeeper. On the facts the mortgagees acted reasonably and their failure to obtain possession and to give notice was not caused by any default on their part. Further, contracts are choses in action which are not made good by s. 44, and the trustee is not entitled to any book debts earned by the receiver in carrying out the contracts.

E. W. Hansell in reply. *In re Tillett* (1) was not cited in *Rutter* v. *Everett.* (2) Between November 29 and December 15 was a reasonable time within which to give notice to the book debtors, and it was not given. It is no answer to say that negotiations were proceeding between the mortgagees and mortgagor. A mortgagee who appoints a receiver and then negotiates with the mortgagor negotiates at his peril.

HORRIDGE J. This is a motion by the trustee in the estate of A. W. Neal for a declaration that certain debts, which I will particularize at the end of my judgment, were in the order and disposition of the bankrupt at the commencement of the bankruptcy with the consent of the true owners. The debts in question were mortgaged by the bankrupt by a deed dated

---

(1) 6 Morr. 70.

(2) [1895] 2 Ch. 872.

November 13, 1909. No notice of any kind was served on the debtors who owed those debts, and on November 29, 1913, a Mr. Warr was appointed receiver by the respondents under an instrument in writing of that date, and that appointment clearly made him receiver of the debts in question. On December 17 the respondents had notice of the act of bankruptcy, and at that time no notice whatever had been given to the debtors who owed these debts. No question can, therefore, arise under the protected dealings clause, s. 49 of the Bankruptcy Act, 1883. It seems clear law from the case of *In re Tillett* (1) that, under s. 44, sub-s. 2 (iii.), of the Bankruptcy Act, 1883, these debts were due to the bankrupt in the course of his trade or business and, no notice having been served on the debtors, were by virtue of that section goods in the order and disposition of the bankrupt at the time of his bankruptcy. That position has not been really denied by Mr. Devonshire, who appears on behalf of the respondents, but he says that these debts, which are made goods by the section, were not in the order and disposition of the bankrupt with the consent of the true owners. In support of that contention he relies on the judgment of Stirling J. in *Rutter* v. *Everett.* (2) In that case the assignee of the debts had on May 9, 1893, appointed a receiver and had no notice of the act of bankruptcy committed by the assignor on May 16 until the receiving order was actually made, which was on June 16, and Stirling J. in his judgment, in the passage at p. 881 which begins "This being my view of the state of the law," does intimate that, inasmuch as the assignee had commenced proceedings which would in the ordinary course have culminated in a notice to the debtors before the act of bankruptcy, if so short a time had elapsed between the appointment of the receiver and the receiving order as in fact not to have given the assignee an opportunity of serving the notice, he would have held that the assignee by getting the receiver appointed had intimated the withdrawal of his consent. I have great doubts in my mind whether that passage in Stirling J.'s judgment is correct. My doubt is whether, when the assignee could at any time have given notice to the person owing the debt, he can be said to have taken every possible step by getting the appointment of a receiver even in a case where the receiver has no reasonable time in which to give notice. If the true owner of debts has taken every possible step to obtain possession of them I think on the authorities he is clearly protected. In this case the receiver was appointed on November 29, and there was nothing then that prevented the assignees of these debts from themselves giving notice of the mortgage and of the appointment of the receiver, nor was there anything to prevent the receiver himself from giving that notice. Negotiations, it is true, took place with regard to the position which the assignees who had appointed the receiver were going to take up as regards the debtor, and there were disputes which apparently occasioned the delay. In this case I can see no reason why notice should not have been given at any time between November 29 and December 17, and therefore every possible step was not taken.

---

(1) 6 Morr. 70.

(2) [1895] 2 Ch. 872.

Then it is suggested that the receiver told the bankrupt's clerk to give the debtors notice, and that he did not give it. I think that the withdrawal of the consent must be by notification to the debtors who owed the money, and consent will not be terminated by mere notice to the debtor. There is no necessity to give notice to the debtor; the assignee of the debts can give notice direct to the person who owes the debt. If it is correct that the receiver did tell the clerk to give notice, I do not think that would operate as a termination of the consent and an assumption of the ownership of these debts. In my view these debts were within the order and disposition of the bankrupt with the consent of the true owners, and therefore the trustee is entitled to the first declaration he asks for. But that declaration must be limited to the debts which were due or accruing due to the bankrupt in the course of his trade or business; and when I say "accruing due" I mean by that a debt which, although it may not have been paid, had been earned by the bankrupt at the commencement of the bankruptcy. I do not mean debts under current contracts where the consideration for those debts was work done by the receiver after he entered into

1914

NEAL, *In re.* THE TRUSTEE, *Ex parte.*

possession; they must be debts which were actually due, the work for which was done before the commencement of the bankruptcy.

Solicitors: *Rawle, Johnstone & Co.; Bartlett & Gregory.*

H. L. F.

1914 *April* 21, 22.

ROCHFORD RURAL DISTRICT COUNCIL *v.* PORT OF LONDON AUTHORITY.

Local Government—Sanitary Authority—Sewage flowing into Little Creek—Part of or Tributary of the Thames—"Caused or suffered"—Thames Conservancy Act, 1894 (57 & 58 *Vict. c. clxxxvii.*), *ss.* 90, 94.

For many years prior to 1909 crude sewage passed from premises of private persons into two sewers which had not been constructed by, but were vested in, the appellants as the sanitary authority, and thence passed into Little Creek. In 1909 the appellants constructed a chamber in each of the two sewers for the purpose of intercepting solid matter and preventing it from being discharged into Little Creek, but the effluent from those chambers still contained sewage matter. In proceedings against the appellants under s. 94 of the Thames Conservancy Act, 1894, for suffering sewage to pass into Little Creek, which was either a part of the Thames or a tributary thereof within s. 90 of the Act:—

Held, (1.) that Little Creek was a part of the Thames or a tributary thereof, and (2.) that the appellants had "caused or suffered" sewage to flow or pass into Little Creek within s. 94.

Reg. v. *Staines Local Board* (1888) 60 L. T. 261 distinguished.

Per Avory J.: *Reg.* v. *Staines Local Board* and the decisions following thereon—*Thames Conservators* v. *Gravesend Corporation* [1910] 1 K. B. 442 and *Waltham Holy Cross Urban District Council* v. *Lee Conservancy Board* (1910) 103 L. T. 192—are inconsistent with the decisions of the Court of Appeal in *Kirkheaton District Local Board* v. *Ainley* [1892] 2 Q. B. 274 and *Yorkshire West Riding Council* v. *Holmfirth Urban Sanitary Authority* [1894] 2 Q. B. 842, and are therefore not binding.

CASE stated by justices for the petty sessional division of Rochford in the county of Essex.

An information was preferred on behalf of the Port of London Authority (hereinafter called the respondents) under the Thames Conservancy Act, 1894, as amended by the Port of London Act, 1908, against the Rochford Rural District Council (hereinafter called the appellants) for that they had unlawfully failed to

1914

ROCHFORD RURAL COUNCIL v. PORT OF LONDON AUTHORITY.

comply with a notice served upon them on December 10, 1912, requiring them to discontinue within fourteen weeks the flow or passage of sewage or other offensive or injurious matter from two sewage chambers under their control situate at South Benfleet, in the county of Essex, into that part of the Thames known as Little Creek, and that after the time so allowed, to wit, on May 13, 1913, they had not discontinued the same, but suffered sewage or other offensive or injurious matter, to which the said notice referred, to pass into Little Creek from the said two sewage chambers, contrary to the provisions of the Thames Conservancy Act, 1894.

At the hearing of the information on July 16, 1913, the following facts were proved:—

The appellants were the sanitary authority for the rural district of Rochford and were the local authority for that district within the meaning of s. 13 of the Public Health Act, 1875. The appellants had not provided a system of sewerage or sewage disposal works for South Benfleet, which is within their district, but there were two old brick sewers there, one of which received the drainage of fifteen houses and the other the drainage of nine houses. Both of these sewers discharged into Little Creek. These sewers and drains were not constructed by the appellants and there was no evidence to shew by whom they were constructed, but it was proved that the sewers had been in use for upwards of thirty years and that down to 1909 crude sewage was discharged through them into Little Creek. In 1909 the appellants constructed a chamber in each of the sewers for the purpose of intercepting solid matter in the sewage flowing therein and preventing it from being discharged into Little Creek. Solid matter was precipitated in the said chambers by the aid of chemicals. The effluent from the chambers was discharged into Little Creek and the flow was continuous except for a period of eight hours once a fortnight. Neither the sewers above and below the said chambers, nor the drains connected with the sewers, were altered or interfered with by the appellants. The chambers were periodically inspected and cleansed by the appellants' servants. During 1912 the appellants deepened the chambers for the purpose of improving the effluent which discharged into Little Creek. On December 10, 1912, the respondents served a notice on the appellants requiring them to discontinue within fourteen weeks the flow or passage of sewage or other offensive or injurious matter, whether solid or fluid, from the said chambers into that part of the river Thames known as Little Creek. On May 13, 1913, samples of the effluent from the two chambers were taken by the respondents' officers at the point of discharge into Little Creek, and those samples shewed that the effluent contained sewage and was offensive.

It was further proved that Little Creek, which is situate at South Benfleet, is tidal and that Thames water flows into it at each ordinary tide to a depth of 4 feet 6 inches; that at low water it is practically dry; that the Thames flows into and ebbs from Little Creek through Benfleet Creek and East Haven Creek, which together form the north and north-west boundaries of Canvey Island; that Little Creek is about four miles from the main stream of the Thames; and that the respondents and their predecessors and the City of London Corporation in their capacity as conservators of the river Thames had exercised jurisdiction over Little Creek as part of the Thames from 1854 to the present time.

On behalf of the appellants it was contended that they did not cause or suffer sewage or other offensive matter to flow into Little Creek; that the said sewers, although vested in them by virtue of the Public Health Act, 1875, were not constructed by them, and that it was not proved that the said drains were connected thereto with their knowledge or approval; that the construction by them of the two intercepting chambers and the inspection and cleansing of the same by their officers for the purpose of improving the effluent and mitigating the nuisance of the former discharge of crude sewage through the said two sewers into Little Creek would not cast a liability upon them for causing or suffering such improved effluent to discharge even though such effluent contained sewage or other offensive matter when no such liability previously existed in the discharge of crude sewage from such sewers; that Little Creek was not part of the Thames within the meaning of the Thames Conservancy Act, 1894, as amended by the Port of London Act, 1908; and that Little Creek, if a tributary of the river Thames, was distant more than three miles from the Thames within the meaning of s. 90 of the Thames Conservancy Act, 1894.

On behalf of the respondents it was contended that the appellants by constructing the said two chambers and chemically treating the sewage therein and controlling the discharge thereof caused or suffered the effluent therefrom to flow or pass into Little Creek, which was part of the Thames.

The justices were of opinion that Little Creek was part of the Thames within the meaning of the Thames Conservancy Act, 1894, and the Port of London Act, 1908; and that the facts proved were distinguishable from the facts in the cases cited on behalf of the appellants—*Waltham Holy Cross Urban District Council* v. *Lee Conservancy Board* (1) and *Thames Conservators* v. *Gravesend Corporation* (2)—in that the appellants had constructed the said two intercepting chambers and had exercised control over the sewage passing into and out of the same, and therefore caused or suffered sewage and offensive matter to flow into Little Creek. They therefore convicted the appellants and fined them 1*s.* and ordered them to pay 4*s.* costs.

The question for the opinion of the Court was whether the justices came to a right determination in point of law.

Macmorran, K.C. (*Naldrett* with him), for the appellants. The appellants were wrongly convicted inasmuch as they did not, within the meaning of s. 94 of the Thames Conservancy Act, 1894 (3), cause or suffer to flow or pass into the Thames

---

(1) 103 L. T. 192.

(2) [1910] 1 K. B. 442.

(3) Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), s. 94: "(1.) Whenever any sewage or matter aforesaid is caused or suffered to flow or pass into the Thames or into any tributary then and in every such case even though such sewage or matter aforesaid had been lawfully so caused or suffered to flow or pass before the passing of this Act the conservators shall give notice in writing to the person causing or suffering the same so to flow or pass requiring him within a time to be specified in such notice but not being less than three months to discontinue such flow or passage.

"(2.) Provided that the conservators may if they think fit at any time and from time to time extend the time specified in such notice by another notice in writing.

. . . . .

"(4.) Any person to whom any

or any tributary thereof sewage or other offensive or injurious matter. The appellants did not construct the sewers, and it is quite clear, on the authority of *Reg.* v. *Staines Local Board* (1), *Thames Conservators* v. *Gravesend Corporation* (2), and *Waltham Holy Cross Urban District Council* v. *Lee Conservancy Board* (3) that they would not be liable under s. 94 for merely allowing that which they could not legally prevent, namely, the use of the sewers by the inhabitants whose drains connected therewith, inasmuch as an inhabitant has an absolute right under s. 21 of the Public Health Act, 1875, to connect his drains with a sewer: *Brown* v. *Dunstable Corporation.* (4) The only distinction between the present case and the *Staines Case* (1) and the two decisions which followed it—the *Gravesend Case* (2) and the *Waltham Holy Cross Case* (3)—is that in the present case the appellants constructed the two intercepting chambers, but the installation of these chambers minimized pollution, and the fact that they have done something which mitigated the nuisance cannot render the appellants liable when they were not liable during the time the crude sewage passed out of the sewers. On the other point: Little Creek is neither a part of the Thames nor a tributary thereof. Benfleet Creek cannot, from its geographical position, be said to be a part of the Thames. Both it and Little Creek might be said to be tributaries of the Thames, but even if Little Creek is in one sense a tributary, it is more than three miles from the main river and therefore is not a "tributary" within s. 90 of the Act. That section excludes from the definition of "tributary" "so much as is more than three miles from the Thames of every river, stream, watercourse, cut, dock, canal, channel and water which first communicates whether

---

notice is under this section given by the conservators shall notwithstanding anything in any other Act within the time allowed by such notice subject to any extension of such time as in this section provided discontinue the flow or passage of the sewage or matter to which the notice refers and in default of so doing shall be guilty of a misdemeanour and be liable on summary conviction thereof or on conviction thereof on indictment to a penalty not exceeding one hundred pounds and to a daily penalty not exceeding fifty pounds."

(1) 60 L. T. 261.

(2) [1910] 1 K. B. 442.

(3) 103 L. T. 192.

(4) [1899] 2 Ch. 378.

directly or indirectly with the Thames at a point eastward of the western boundary of the county of London."

George Wallace, K.C. (*C. B. Marriott* with him), for the respondents, was not called upon on the question whether Little Creek was a part of the Thames or a tributary thereof.

On the main question: the appellants were rightly convicted for they caused or suffered sewage to pass into the Thames. It has to be borne in mind that s. 94 applies to the upper as well as to the lower river, and if the *Staines Case* (1) is good law, which it is submitted it is not, it will be almost impossible for the section to have any operative effect. The Act of 1894 was passed after the decision in the *Staines Case* (1); and from the recital in the preamble that "it is expedient that the powers of the conservators for preventing pollution of the waters of the river Thames be enlarged," it must be taken that the Legislature intended to confer upon the conservators greater powers than they previously had. The *Staines Case* (1) was founded upon the decisions in *Glossop* v. *Heston and Isleworth Local Board* (2) and *Attorney-General* v. *Dorking Union* (3), but those decisions have been declared to be wrong by the Legislature in the Rivers Pollution Prevention Act, 1893. That statute, which is entitled "An Act to explain the Rivers Pollution Prevention Act, 1876," provides by s. 1 that "Where any sewage matter falls or flows or is carried into any stream after passing through or along a channel which is vested in a sanitary authority, the sanitary authority shall, for the purposes of section three of the Rivers Pollution Prevention Act, 1876, be deemed to knowingly permit the sewage matter so to fall, flow, or be carried." The Thames Conservancy Act, 1894, followed upon that statute and upon the decision of the Court of Appeal in *Yorkshire West Riding Council* v. *Holmfirth Urban Sanitary Authority* (4), where it was held, on facts practically identical with those in the present case, that the local authority had "wilfully permitted" sewage matter to flow into a stream within the meaning of the Rivers Pollution Prevention Act, 1876, and it must taken that in the Act of 1894 the Legislature adopted that decision. The *Holmfirth Case* (4),

---

(1) 60 L. T. 261.

(2) (1879) 12 Ch. D. 102.

(3) (1882) 20 Ch. D. 595.

(4) [1894] 2 Q. B. 842.

1914

ROCHFORD RURAL COUNCIL *v.* PORT OF LONDON AUTHORITY.

which confirmed *Kirkheaton District Local Board* v. *Ainley* (1), was not referred to in the *Gravesend Case* (2) or in the *Waltham Holy Cross Case* (3), which followed the *Staines Case.* (4) This Court ought to follow the *Holmfirth Case.* (5) Further, it is to be observed that in the *Waltham Holy Cross Case* (3) the decision proceeded upon the ground that the local authority had done nothing in the way of controlling the sewage; in this case the local authority have exercised control by the construction of the intercepting chambers. This point was not dealt with in the *Gravesend Case.* (2)

[He was stopped.]

Macmorran, K.C., in reply. The Rivers Pollution Prevention Act, 1876, upon which the *Holmfirth Case* (5) was decided, does not apply to tidal waters, and by that Act a very different standard is applied from that which is applied in the Thames Conservancy Act, 1894. There are three decisions of the Divisional Court which are precisely in point—the *Staines Case* (4), the *Gravesend Case* (2), and the *Waltham Holy Cross Case* (3)—and this Court is bound by them.

DARLING J. In my opinion this appeal fails. The question is whether within s. 94 of the Thames Conservancy Act, 1894, the appellants "suffered" sewage to flow or pass into the Thames. It would not be an accurate use of language to say that they "caused" it to flow into the Thames inasmuch as it was not sewage which they brought from any houses of their own; it came from houses of people who were strangers to the appellants and it came down a drain not constructed by the appellants and passed into sewers not constructed by, but vested in, the appellants. Apart from decisions one would have said that if, without committing a legal wrong, a person is in a position to stop a thing, and does not stop it, he "suffers" it. Thus, if a person is in a situation where he might, without committing any legal wrong, prevent a stream from flowing in a particular direction, and he does not prevent it, he "suffers" it to flow in that direction; but he cannot be said to "suffer" it if he is not in a position either physically to prevent it or if by law he ought not to prevent it. In my opinion the present appellants were in a position in which they physically could, and legally might, have stopped this sewage from flowing into Little Creek. The difficulty has been created by certain decisions, in particular by that in *Reg.* v. *Staines Local Board.* (1) It is to be observed, however, that in that case Field J. said this (2): "There are no findings of fact which show that the defendants have suffered sewage to flow through these sewers into the Thames. A man cannot be said to suffer another person to do a thing which he has no right to prevent. I find that no persons but owners who had acquired prescriptive rights appear to have used these sewers, and I fail to see how as regards these persons the defendants have suffered sewage to flow into the Thames." Wills J. near the foot of the same page said: "The substance of the case against the defendants appears to be, that they did not stop, by physical act or legal proceedings, the people who had gained these rights. They had no right whatever to interfere with, or stop them. They could not have stopped them by legal proceedings, because it has been held that people can acquire such legal rights. They could not have stopped them physically, or they would have rendered themselves liable to legal proceedings for doing an unlawful act." The present case is in my opinion clearly distinguishable from the *Staines Case* (1) because in this case the appellants could have stopped this stuff from flowing into the Thames. That they could have stopped all the liquid I do not say, but they could have prevented sewage matter, such as the statute is dealing with, from flowing into the Thames, and that which would have gone into the Thames would have been harmless liquid. If by the construction of the tanks they could prevent a portion of the sewage matter coming from the drains from flowing into the Thames, I think they could have stopped all of it in the sense that only innocuous liquid would have gone into the Thames, and in that case they would not have committed an offence. The *Staines Case* (1) cannot be regarded as an altogether satisfactory decision. It was questioned by Lord

---

(1) [1892] 2 Q. B. 274.

(2) [1910] 1 K. B. 442.

(3) 103 L. T. 192.

(4) 60 L. T. 261.

(5) [1894] 2 Q. B. 842.

---

(1) 60 L. T. 261.

(2) 60 L. T. at p. 264.

Alverstone C.J. in the *Gravesend Case* (1), and it appears to me that if the judgment of the Court of Appeal in *Yorkshire West Riding Council* v. *Holmfirth Urban Sanitary Authority* (2) had been brought to his notice the Lord Chief Justice would have found his doubts as to the soundness of the decision in the *Staines Case* (3) fully confirmed. In *Yorkshire West Riding Council* v. *Holmfirth Urban Sanitary Authority* Lindley L.J. said (4): "I do not find that the board have caused this sewage to flow into the river; but have they knowingly permitted it so to flow? Prima facie I take it that the owner of a sewer which discharges itself into a river knowingly permits that discharge. If he could shew that he does not knowingly permit it because he cannot prevent it it would be competent for him to do so; but there is no evidence of that sort here." If a man knowingly permits a thing to happen he certainly suffers it to happen. A man who suffers a thing to happen does not necessarily permit it, as he may not have the physical power or the right to stop it; but if he has that power or right, and does not stop it, he suffers the thing to happen. On this ground the appellants are wrong in their contention.

A further point was taken by Mr. Macmorran that this place called Little Creek is neither a part of the Thames nor a tributary thereof. It may not be right to call it a part of the Thames, although I do not say it is not, but I think, looking at the map and the position of Canvey Island, that Benfleet Creek is a part of the Thames, and that Little Creek is a tributary of the Thames because it falls directly into Benfleet Creek, which is a part of the Thames. Little Creek being thus a tributary of the Thames, it comes within the Act. The appeal therefore fails and must be dismissed.

AVORY J. I am of the same opinion. The only question which we have to decide is whether there was evidence upon which the justices could properly find that the appellants had suffered sewage to flow or pass into the Thames or into any tributary thereof. Upon the first question whether the appellants suffered

(1) [1910] 1 K. B. 442.

(2) [1894] 2 Q. B. 842.

(3) 60 L. T. 261.

(4) [1894] 2 Q. B. at p. 847.

sewage to flow into the Thames it has been forcibly contended before us that this Court is bound by the decisions in the *Staines Case* (1), the *Gravesend Case* (2), and the *Waltham Holy Cross Case* (3) to hold that the appellants cannot be said to have suffered the sewage to pass into the Thames. As to these cases I desire to say that I share the doubt expressed in the *Gravesend Case* (2) by Lord Alverstone C.J. as to the soundness of the decision in the *Staines Case*. (1) The Lord Chief Justice there said this (4): "I am bound to say that I have always felt some difficulty in understanding how it can be said that, if there is a duty on a local authority to dispose of the sewage within their district, and the local authority, in disposing of it, sends it through a sewer into a river, the local authority do not cause or suffer the sewage to go into the river." The expression of that doubt would not, of course, of itself be sufficient for us to refuse to follow the *Staines Case* (1) if it applies here and if, which is to my mind more important than any distinction between that case and the present, that case is consistent with the decisions of the Court of Appeal, for if there are decisions upon the same subject-matter in the Court of Appeal and the Divisional Court we are bound to follow the decisions of the Court of Appeal. The *Staines Case* (1) was followed in the *Gravesend Case* (2), and it was again followed in the *Waltham Holy Cross Case*. (3) The question is, are these decisions binding upon us, and are they consistent with the decisions of the Court of Appeal? In my opinion the decisions of the Court of Appeal in *Kirkheaton District Local Board* v. *Ainley* (5) and of *Yorkshire West Riding Council* v. *Holmfirth Urban Sanitary Authority* (6) are inconsistent with the judgments in the *Staines Case* (1) and the two cases that followed it. In the *Kirkheaton Case* (5) the Court had to determine whether an injunction ought to be granted against the defendants in that action at the suit of the local board. It was found that the defendants were persons who were causing sewage to flow into a river. Prima facie there was a case for an injunction against the defendants, but the Court refused to grant it on the ground that the plaintiffs themselves, the local board, were in default, and were themselves committing the offence under the statute. Bowen L.J. said this (1), speaking of the defendants: "It appears to me that any person causes the flow of sewage into a stream within this enactment, who intentionally does that which is calculated according to the ordinary course of things and the laws of nature to produce such flow. A person who causes the flow of sewage into a channel, through which by the ordinary course of gravitation it will find its way into a stream, causes it to flow into the stream." After dealing with various sections Bowen L.J. continued: "It might possibly be an answer to the complaint that they had neglected their duty to deal with the sewage in their sewers, if they could shew that they were actually without the means of disposing of it, and had not the power in any reasonable way to dispose of it; but I shall wait until a local board can satisfy me that it is in such an unfortunate position before I decide that question. In this case there does not appear to me to be anything to shew that the plaintiffs are in that position; on the contrary, on the materials before me, I cannot but think there are means by which they could deal with the sewage in these sewers so as to prevent it finding its way into the stream. If they have the power they are bound to do so. Therefore, I think that they themselves are within the section as persons who permit sewage to flow into the stream. It is no answer to say, if such were the fact, that the Local Government Board has pronounced an opinion in their favour that there were no means by which they could prevent the sewage from flowing into the stream." The decision in that case was followed in *Yorkshire West Riding Council* v. *Holmfirth Urban Sanitary Authority*. (2) It appears to me therefore that in view of these two decisions of the Court of Appeal the present appellants suffered this sewage to flow into the Thames, and upon that ground alone we are not only justified but are compelled to follow the decisions of the Court of Appeal and not those of the Divisional Court. If it had been necessary to find a distinction between the

---

(1) 60 L. T. 261.

(2) [1910] 1 K. B. 442.

(3) 103 L. T. 192.

(4) [1910] 1 K. B. at p. 449.

(5) [1892] 2 Q. B. 274.

(6) [1894] 2 Q. B. at p. 847.

(1) [1892] 2 Q. B. at p. 283.

(2) [1894] 2 Q. B. 842.

present case and the *Staines Case* (1), the *Gravesend Case* (2), and the *Waltham Holy Cross Case* (3)—I mean not a mere fanciful, but a real distinction—I think there is a real distinction in this case from the facts in those three cases. In the first place, the *Staines Case* (1) turned upon the special findings of the jury. The jury found a special verdict, and Field J., in giving judgment, said (4) : " The defendants are charged with causing and suffering sewage to flow into the Thames, the special verdict finds that they did not cause sewage to flow. None of the sewers complained of were constructed by the defendants, and there is no finding, in express terms, that they suffered sewage to flow into the Thames." I have always read that case as merely an authority upon the special findings of the jury, and it may amount to nothing more than this, that the proper questions were not left to the jury. It may be that a question ought to have been left with a proper direction whether the defendants had suffered sewage to flow. That question never was left and there is no finding in regard to it. With regard to the *Gravesend Case* (2) and the *Waltham Holy Cross Case* (3), they are distinguishable. The decision in the *Waltham Holy Cross Case* (3) was expressly based upon the fact that the local authority had done nothing which would bring the sewage there in question under their control, and the decision of the Court of Appeal in *Kirkheaton District Local Board* v. *Ainley* (5) was not followed for that reason alone. In the *Gravesend Case* (2), although it is a fact that something had been done in the shape of extending the sewer, it is quite clear that that point was never brought to the attention of the Court and was not the subject of decision. In the present case something very material has been done by the local authority : they have altered the character of the sewer ; they have made catchpits and have altered the mode by which the sewage passes into the river. They have done something which has brought the sewage actually under their control, and that alone would be a sufficient ground of distinction between this case and the others, but I prefer to base my judgment upon

(1) 60 L. T. 261.

(2) [1910] 1 K. B. 442.

(3) 103 L. T. 192.

(4) 60 L. T. at p. 263.

(5) [1892] 2 Q. B. 274.

the decisions of the Court of Appeal which appear to me to apply to the statute now in question.

Upon the other point I have nothing to add, except this, that in my opinion there was evidence upon which the justices could properly find, as they have found, "that the respondents and their predecessors, the Thames Conservancy, and the Lord Mayor, Aldermen and Commonalty of the City of London in their capacity as conservators of the river Thames have exercised jurisdiction over Little Creek as part of the Thames from the year 1854 to the present time." If there was evidence upon which they were justified in finding that as a fact, there is nothing in the statute which makes it impossible or improper so to find.

ROWLATT J. I agree that the appeal fails. Speaking for myself, if the present appellants had done nothing to this sewer but had merely allowed the sewage to run down as before I should have felt bound to decide that they were right on that part of the case, in deference to the decision in the *Staines Case* (1) and in the other cases which followed it. The *Staines Case* (1) was decided on the Thames Navigation Act, 1866, which contained the words "cause or suffer." Those words are re-enacted in the Act of 1894, upon which the *Gravesend Case* (2) was decided, and there are similar words in the Lee Conservancy Act, 1868, upon which the *Waltham Holy Cross Case* (3) was decided. In these circumstances I think the construction of the words "cause or suffer" in these Acts is now established. But it is said that in the interpretation of the Rivers Pollution Prevention Acts, which contain very similar words, a different construction, and one which if the matter were res integra I think is a better construction, has been applied. It is to be remembered, however, that the *Kirkheaton Case* (4) was cited to the Divisional Court in the *Waltham Holy Cross Case* (3), yet that Court, in a considered judgment, followed the *Staines Case*. (1) In these circumstances, speaking for myself, I do not see my way to say that the *Staines Case* (1) is not now law. It seems to me, however, that the present case is distinguishable from the *Staines Case* (1) upon the ground upon

(1) 60 L. T. 261.

(2) [1910] 1 K. B. 442.

(3) 103 L. T. 192.

(4) [1892] 2 Q. B. 274.

which the justices put it. They have found that the appellants by the construction of the two intercepting chambers have exercised control over the sewage; they have interfered by this alteration and have taken responsibility for it. It could not be disputed that if the local authority interposed elaborate works in an ancient sewer and thus utilized it, that sewer would become a new sewer, and that in such circumstances the *Staines Case* (1) would not apply. It thus becomes a question of degree. There might be something done by the local authority so trifling that the maxim de minimis would apply. But in this case the appellants have constructed two catchpits which made the sewer a more desirable sewer for the locality, for the sewage was prevented from going out in the same form as before. The justices therefore had materials upon which they could say that the sewer was not a sewer such as was in question in the *Staines Case* (1), and that the appellants have actively adapted it and made themselves responsible for the sewage.

It was next said that Benfleet Creek was not a part of the Thames and therefore that Little Creek was not a tributary within the meaning of s. 90 of the Thames Conservancy Act, 1894. In the definition of "the Thames" in the Act (see s. 3) the word "Thames" is used as an expression which already means something in common parlance. Does the Thames in common parlance include these salt water creeks which run into the coasts of Essex and Kent? It is found in the case that the conservators and the Corporation of the City of London as conservators had exercised jurisdiction not only in Benfleet Creek but in Little Creek, and therefore the justices found that they were part of the Thames. In these circumstances it is impossible to disturb the justices' decision that Benfleet Creek at any rate is part of the Thames.

Appeal dismissed.

Solicitors for appellants: *Kingsford, Dorman & Co., for Gregsons & Powell, Southend-on-Sea.*

Solicitor for respondents: *E. A. I. Glenshaw.*

J. S. H.

---

(1) 60 L. T. 261.

C. A.

1913

Dec. 9.

[IN THE COURT OF APPEAL.]

WALKER *v.* SUR AND OTHERS.

Practice—Parties—Action of Debt against Unincorporated Society—"Persons having the same interest in one cause or matter"—Order authorizing one or more to defend on behalf of all—Order XVI., *r.* 9.

In a common law action of debt for professional services rendered the plaintiff sued four named defendants "on their own behalf and on behalf of all other members of" an unincorporated religious society, most of the members of which resided abroad. After a defence had been delivered, the plaintiff, with a view to binding the society and its property, took out a summons under Order XVI., r. 9, asking that the writ and all subsequent proceedings be amended by describing the defendants as being "sued on their own behalf and on behalf of all other members of" the society, and further asking that "as the members of the said order are numerous and the above-named defendants are some of them, they be directed to defend the action on behalf of or for the benefit of all persons so interested, pursuant to Order XVI., r. 9." The four defendants were not trustees of the society:—

Held, that the plaintiff was not entitled to a representation order under Order XVI., r. 9.

APPEAL of the defendants from an order of Bucknill J. sitting at chambers.

The plaintiff issued a writ against the four defendants, who were described as "J. Marin Sur, Joseph Gaethe, Augustus Metzler, and Pacome Hughes, sued on their own behalf and on behalf of all other members of the Brotherhood of St. John of God."

The claim indorsed on the writ was "against the defendants on their own behalf and on behalf of all other members of the Brotherhood of St. John of God" for 500*l.* for professional services rendered, work and labour done, and money expended to and for the defendants by the plaintiff as an architect at their request in connection with the Hospital of St. John of God, situate at Scorton in the county of York.

The four defendants entered an appearance "on their own behalf and as members of the Brotherhood of St. John of God," and subsequently pleaded a defence on the merits and a counterclaim.

The plaintiff, with a view of binding the brotherhood and its property, then took out a summons asking that the writ and all subsequent proceedings be amended by describing the defendants as "sued on their own behalf and on behalf of all other members of L'Ordre des Frères Hospitaliers de Saint Jean-de-Dieu," and that "as the members of the said order are numerous and the above-named defendants are some of them, they be directed to defend the action on behalf of or for the benefit of all persons so interested, pursuant to Order xvi., r. 9."

Order xvi., r. 9, is as follows: "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued, or may be authorized by the Court or a judge to defend in such cause or matter, on behalf of or for the benefit of all persons so interested."

The Master refused to make any order upon the summons.

Upon appeal to Bucknill J., the learned judge made this order: "It appearing that the members of the Brotherhood of St. John of God are numerous and have the same interest in the cause or matter and that the above-named J. Marin Sur, Joseph Gaethe, Augustus Metzler, and Pacome Hughes are some of them, it is ordered that the said J. Marin Sur, Joseph Gaethe, Augustus Metzler and Pacome Hughes do defend this action on behalf of or for the benefit of all persons so interested, the plaintiff undertaking in the event of his getting a judgment not to take any proceedings on it out of the jurisdiction." Leave to appeal was given.

The following is an extract from an affidavit sworn by the defendant Sur in opposition to the summons:—"The members of the said brotherhood are over 1800 in number, and are scattered over France, Germany, Spain, Italy, and other parts of the world. The centre of government of the said order is at Rome, and the head of it is the Superior General, who with the assistance of a general council controls and legislates about matters which affect the whole order. The freehold of the said hospital at Scorton and other property held therewith is vested as follows: As to part thereof in the Rev. Louis Gaudet of Scorton, the defendant Gaethe, the defendant Metzler and others as joint tenants. The only members of the said brotherhood who have any interest in this cause or matter are the said brothers or members who gave the plaintiff some instructions, and the said Provincial in France and possibly myself as the present prior of the said hospital, and possibly the defendant Gaethe as the present sub-prior thereof. The other members of the said brotherhood have no interest in this cause or matter and have no common interest with the defendants in this action, and I submit are not jointly liable with the defendants in this action."

The defendants now appealed to the Court of Appeal against the order made by Bucknill J.

Spokes, for the defendants. A representation order should not be made in a common law action for debt. It is true that in the Annual Practice, at p. 234, the contrary is laid down in the following terms :—" Where a plaintiff desires to sue any combination of persons under a title purporting to be the name of a society or club or association (not being a registered society or a partnership firm) upon a debt contracted in the name adopted by the combination, it is the practice to allow him to sue two or more members thereof by their names with the added statement that they are 'sued on their own behalf and on behalf of all other members of the' combination. A representation order should be obtained." But there is no authority for such practice, which would be wrong. An action of debt against a large number of persons jointly was never heard of in which the defendants had not been served with the writ; there cannot be judgment on an indebitatus count against a person not served with the writ. Appearance has been entered for four persons only ; there are therefore no other parties to the action. The plaintiff is trying to make use of Order XVI., r. 9, instead of Order XI., r. 1 (*e*) ; Order XVI., r. 9, however, only applies to numerous persons having the same interest, but the foreign members of this society are not interested within the meaning of that rule, and in an action for debt they have no interest, but merely a burden. It is not alleged that any one contracted in the name of the brotherhood. Order XVI., r. 9, was not intended to give the Court jurisdiction over foreigners. [He cited *Markt & Co.* v. *Knight Steamship*

Co. (1); *Wood* v. *McCarthy* (2); *In re Busfield, Whaley* v. *Busfield* (3); Dicey on Conflict of Laws, 2nd ed., p. 222; Story on Conflict of Laws, p. 506.]

Lowenthal, for the plaintiff. The question is whether Order XVI., r. 9, applies to a common law action; it is submitted that it does. It is admitted that the judgment would not enable the plaintiff to issue execution against persons who are not parties to the writ, but the plaintiff's contention is that his only employment was on behalf of the brotherhood as a whole, and the object of the order is to bind the brotherhood by the decision, and to obtain a declaration that the work was done on behalf of the 1800 members; it would be absurd to serve them all with the writ. The object of Order XVI., r. 9, is to relieve the plaintiff of the burden of suing numerous defendants and to permit him to serve a small number of them in a representative action. In *Taff Vale Railway* v. *Amalgamated Society of Railway Servants* (4) Lord Lindley said: "I have myself no doubt whatever that if the trade union could not be sued in this case in its registered name, some of its members (namely, its executive committee) could be sued on behalf of themselves and the other members of the society, and an injunction and judgment for damages could be obtained in a proper case in an action so framed."

[KENNEDY L.J. Lord Lindley was there speaking of a representative committee; here you are dealing with mere individuals.]

The reference to the representative committee is merely a reference to the persons who may be thought properly to represent the society. [He also cited *Ellis* v. *Duke of Bedford*. (5)]

Spokes in reply.

VAUGHAN WILLIAMS L.J. In the particular case I think that the order was wrong, but, although I am of that opinion, I do not feel that I have thoroughly understood what the rule-makers meant by Order XVI., r. 9.

This is an action for debt, and there is an allegation that money is due to the plaintiff for work done by him as an architect on behalf of an aggregate body of people who have no corporate existence and whom it would be practically impossible to sue individually. I cannot doubt that the intention of Order XVI., r. 9, was to make easier the bringing of actions for the enforcement of rights against an unincorporated aggregate of people. What the rule says is this: "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sued or be sued, or may be authorized by the Court or a judge to defend any such cause or matter, on behalf of all persons so interested." The rule, as it stands, does not purport to leave it to the mere will or choice of the plaintiff or of the defendants, nor to give a right in either case of selection at the choice of a plaintiff who wishes to sue representative members of an unincorporated society. As I understand the rule, it lies with the judge to give the authority, and if he thinks it a case in which the plaintiff may properly sue the persons that he proposes to sue as people proper to be authorized to defend in such cause or matter on behalf of or for the benefit of all persons so interested, then the order may be made. That has not happened in the present case.

---

(1) [1910] 2 K. B. 1021.

(2) [1893] 1 Q. B. 775.

(3) (1886) 32 Ch. D. 123.

(4) [1901] A. C. 426, at p. 443.

(5) [1901] A. C. 1, at p. 8.

I only propose to say something about this particular action, which is an action of debt and is brought by an architect against these four individuals as representing the Brotherhood of St. John of God. That being the form of the claim, it may be a right thing for the judge to say "I do not think you have got the right sort of people as representative defendants; cannot you find out whether there are managers of this body; if you can shew me that there is such a body, I may think the defendants proper persons in an action against this unincorporated society." But that is not what has been done here. What has been done here is that the plaintiff, who has done work on behalf of this unincorporated society, chooses one or more members of the society to sue on behalf of the others. He does not suggest that there is any peculiar fitness in the four persons whom he has picked out as defendants. Under those circumstances I think it sufficient to say that I do not think that this particular action of debt against these four persons is within the provisions of Order XVI., r. 9.

BUCKLEY L.J. The plaintiff sues for money due for professional services rendered, work and labour done, and money spent for the defendants by him as an architect at their request. The defendants are four in number, and the plaintiff is suing for money due to him for services rendered to the four defendants. The indorsement on the writ expresses that "The plaintiff's claim is against the defendants on their own behalf and on behalf of all other members of the Brotherhood of St. John of God." Those words, however, do not affect the fact that the plaintiff is suing four persons for money due.

If this order had not been appealed, and the plaintiff had gone to trial and asked for judgment, what judgment could he have obtained? At the most an order against these four persons. It is said that these four persons together with many others, making up about 1800 in all, are members of the society called "The Brotherhood of St. John of God," and that that body of persons or a smaller number—say 1000 persons—own property in Yorkshire, and that most or all of the other members of the brotherhood are abroad and, being outside the jurisdiction, cannot be reached. The plaintiff says "I want to have execution against the property in Yorkshire." But when he had obtained his judgment he could have had execution only against the share of these four persons in that property. There is nothing representative about that.

Order XVI., r. 9, in the form in which it is expressed, raises a question as to which I do not propose to decide anything, but it is strange that it runs thus as regards defendants. Reading the words relevant to defendants its language is "one or more of such persons may be sued or may be authorized by the Court or a judge to defend on behalf of or for the benefit of all persons so interested." One or more may therefore be sued on behalf of all or may be authorized to defend on behalf of all. If all can effectually be sued, it would be strange if all could not effectually defend. Can the rule mean that while all may be sued by representatives they cannot defend unless the Court gives authority so to do? However this may be, this plaintiff has intituled this writ as between himself as plaintiff and the four persons sued on their own behalf and on behalf of all other private members of the Brotherhood of St. John of God without shewing that the defendants are representative parties such as that, if the plaintiff joins them, they will be proper persons for the Court to adopt as qualified to defend on behalf of the absent parties. In my judgment that is wrong.

The plaintiff has not asked for any declaration of right as between himself and all the members of a class, which, if affirmed in his favour, could be enforced against individual members of the class. He is only suing for money, for which he wants judgment against certain persons, and he wants by this order to be in a position to say that he is pursuing his remedy against persons who are not parties in the sense of being parties on the record. It is true that Mr. Lowenthal has disclaimed that if he got judgment in this action he could enforce it against a person who is not a party; but that is not the question for our determination. We have to determine whether this action ought to go on so as that execution could be maintained against all the persons represented. In my judgment that would be impossible. It is simply an action of debt against a large number of individuals, and no judgment could be obtained which would be representative against all of them; there could only be a judgment individually against each of them.

For these reasons I think that the order of the learned judge was wrong, and that the appeal must be allowed.

Kennedy L.J. I have come to the same conclusion. I wish that r. 9, so far as regards defendants, was clearer than it is, but I will confine myself to saying that this is an action of debt, and that such an action, where the person or persons sought to be sued are, as here, members of an unincorporated body which cannot itself be sued, will not lie, framed, as this action is sought to be, under the authority given by the learned judge. I admit that I feel a difficulty in saying what does, and in general terms what ought not to, fall within the terms of this permission; but of the body in the present case we know very little on the affidavits before us, and it is not pretended that, as was the case in the *Taff Vale Case* (1), there are any funds vested in trustees.

---

(1) [1901] A. C. 426.

It is not alleged that there are any such trustees at all, and the claim is to my mind a claim in which it is sought to make a judgment for payment of money effective against a number of persons who belong to a named society but who have no common fund vested in trustees who could be joined as representing the society.

When I consider the nature of a money claim, I think the case becomes for this purpose reasonably clear, because day by day, if this is a large body, one member is going out and another is coming in. The body is continually changing, and to give a judgment against all the members for debt would be to include the case of an incoming member, who would be made liable though he was not a member at the date of the contract and in the case of an outgoing member you would have to take the state of things at the date of the judgment. A judgment could not very well be given against one who had ceased to be a member, and yet they are all supposed to be those persons who are said to be represented. If this order stands, they would, I suppose, be anybody who at the date—I do not know whether it would be at the date of the commencement of the action or of the judgment—is a member of the society.

It seems to me to be impossible to maintain the order made in this particular case, and, speaking for myself, I desire to add that I think an additional difficulty arises in the case of persons whom it is sought, so to speak, to bind by the judgment in the action—persons who have never been served, and could only be made parties by the exercise of the judicial powers which exist in certain cases under Order xi. I agree that one can come to a conclusion without laying stress upon that point, although I think that in itself it would have presented some difficulty in regard to the maintenance of the order which the learned judge made when reversing the Master.

Appeal allowed.

Solicitors for plaintiff: *Crossman, Prichard & Co., for O. J. Charlton, Newcastle-on-Tyne.*

Solicitors for defendants: *Radford & Frankland, for W. J. Ward, Newcastle-on-Tyne.*

W. J. B.

END OF VOL. II.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1914, will be as follows:—

In the First Series,
[1914] 1 Ch. [1914] 2 Ch.

In the Second Series,
[1914] 1 K. B. [1914] 2 K. B. [1914] 3 K. B. [1914] P.

In the Third Series,
[1914] A. C.

INDEX.

ACCIDENT—Workmen's compensation.
See under EMPLOYER AND WORKMAN.

ACCIDENTAL SLIP—Judgment—Amendment—Practice - - - - - 734
See JUDGMENT.

ACT OF BANKRUPTCY.
See under BANKRUPTCY.

ACTION—Parties.
See under PRACTICE.

ADMIRALTY.
See under SHIPPING.

AFTER-ACQUIRED PROPERTY—Life policy—Bankruptcy—Discharge of bankrupt—Premiums paid by bankrupt without knowledge of trustee—Second bankruptcy—Death of assured—Duty of trustee - - - - - - 689
See BANKRUPTCY. 1.

AGENT—Principal and.
See under PRINCIPAL AND AGENT.

AGREEMENT.
See under CONTRACT.

AGRICULTURAL HOLDINGS—Claims by landlord and tenant—Arbitration—Rejection of evidence by arbitrator—"Misconduct"—Appeal - - - 478
See LANDLORD AND TENANT. 1.

AGRICULTURAL HOLDINGS ACT, 1908, ss. 13, 30, 43 ; Sched. II. - - - 478
See LANDLORD AND TENANT. 1.

ALLOWANCES—Costs.
See under COSTS.

AMENDMENT—Judgment—Accidental slip—Practice—Judgment wrongly entered against married woman - - 734
See JUDGMENT.

APPEAL—Agricultural holdings—Arbitration—"Misconduct"—Competency of appeal to Divisional Court - - - 478
See LANDLORD AND TENANT. 1.

—— Arbitration.
See under ARBITRATION.

—— County court, Appeal from—Non-appearance of respondent—Motion to reinstate—Jurisdiction of High Court - 421
See PRACTICE. 1.

—— County court—Practice—Point of law not raised in county court—Point going to jurisdiction of the Court — National Insurance Act, 1911, s. 67 - - 352
See COUNTY COURT. 2.

—— Criminal law — Pleading — Indictment—Duplicity—Objection—"No substantial miscarriage of justice" - - 99
See CRIMINAL LAW. 7.

—— Jury action—Disagreement of jury—Application for judgment—Appeal—Power to enter judgment - - - - 420
See PRACTICE. 2.

—— Workmen's compensation — Company — Committee of accident fund—Decision final — Appeal to Court of Appeal—Jurisdiction - - - - - 243
See EMPLOYER AND WORKMAN. 3.

—— Workmen's compensation—Court of Appeal or Divisional Court - - - 257
See EMPLOYER AND WORKMAN. 8.

APPOINTMENT — Director — Company.
See under COMPANY.

—— Receiver, Appointment of — Execution—Practice—Equitable execution. - 183
See EXECUTION.

ARBITRATION—Agricultural holdings—Rejection of evidence by arbitrator—"Misconduct"—Competency of appeal to Divisional Court. - - - **478**
See LANDLORD AND TENANT. 1.

—— Award—Workmen's compensation—Infant workman – Weekly payments—Application to review—Retrospective award **30**
See EMPLOYER AND WORKMAN. 7.

—— Land values — Provisional valuation — Appeal from referee — Order to pay "expenses"—Unascertained amount—Rule of Court - - - - **842**
See REVENUE. 5.

ARBITRATOR.
See under ARBITRATION.

ARRANGEMENT, DEED OF — Bankruptcy — Non-registration — Assignment for benefit of scheduled creditors - **77**
See BANKRUPTCY. 3.

ARTICLES OF ASSOCIATION—Company **770**
See COMPANY.

ASSIGNEE — Lease — Repairing covenants — Death of assignee intestate –Executor de son tort—Liability - - **562**
See LANDLORD AND TENANT. 3.

ASSIGNMENT—Deed of arrangement — Non-registration—Assignment for benefit of scheduled creditors - - - **77**
See BANKRUPTCY. 3.

—— Notice of assignment—Mortgage of book debts — Receiver — Bankruptcy of mortgagor — Order and disposition — Consent of true owner—Debts due or growing due - - - - **910**
See BANKRUPTCY. 6.

—— Solicitor and client—Retainer to conduct action—Authority to compromise after judgment — Assent to assignment by defendant for benefit of creditors **758**
See SOLICITOR. 3.

ATTACHMENT — Motion for against limited company—Contempt of Court - **866**
See CONTEMPT OF COURT.

ATTEMPTED SUICIDE — Whether punishable with hard labour—"Attempt to commit felony" - - - - - **107**
See CRIMINAL LAW. 1.

AUTREFOIS ACQUIT — Plea — Two offences substantially the same - - **570**
See CRIMINAL LAW. 6.

AWARD.
See under ARBITRATION.

BANKER—*Deposit of Securities by Broker—Authority of Broker to Pledge — Estoppel — Purchase for Value in Good Faith.*

The plaintiff had bought through a firm of stockbrokers certain shares of which one H. was the registered holder. Upon the certificates for the shares was indorsed a form of transfer which had been executed by H. The plaintiff allowed the certificates to remain in the hands of the stockbrokers in this condition. The stockbrokers proposed and the plaintiff agreed that the shares should be registered in names other than his own name. Before this was done they deposited the certificates with the defendants, their bankers, as security for their account with the defendants, requesting the defendants to have the shares registered and certificates made out in the names of two nominees of the defendants. This was done. The stockbrokers then became bankrupt, owing a large sum to the defendants. The plaintiff claimed the certificates. The defendants asserted the right to hold them as bona fide pledgees without notice of the plaintiff's title:—

Held, (1.) on the facts, that there was nothing to put the defendants upon inquiry as to the extent of the stockbrokers' authority to pledge the certificates.

London Joint Stock Bank v. *Simmons* [1892] A. C. 201 followed.

Held, (2.) that the plaintiff was estopped from setting up his title as against the defendants, having left the certificates in the hands of the stockbrokers in such a condition as to convey a representation to any person who took them from the stockbrokers that they had authority to deal with them.

Colonial Bank v. *Cady* (1890) 15 App. Cas. 267 applied. FULLER *v.* GLYN, MILLS, CURRIE & Co. - - - - - **Pickford J. 168**

BANKRUPTCY — *After-acquired Property—Life Policy—Discharge of Bankrupt—Premiums paid by Bankrupt without Knowledge of Trustee —Second Bankruptcy — Death of Assured — Duty of Trustee.*

A bankrupt the year before his discharge became operative effected a policy on his own life at an annual premium, and kept the policy on foot for six years, when he became bankrupt a second time and shortly afterwards died. The policy was disclosed in the second bankruptcy and the trustee in that bankruptcy received the policy moneys, which admittedly belonged to the trustee in the first bankruptcy, who did not know of the existence of the policy:—

Held, that the trustee in the first bankruptcy as an officer of the Court was under no obligation —legal, equitable, or moral—to allow out of the policy moneys to the trustee in the second bankruptcy the amount of the premiums the debtor had paid.

In re Tyler [1907] 1 K. B. 865 distinguished.

Tapster v. *Ward* (1909) 101 L. T. 503 followed. *In re* PHILLIPS - **Horridge J. 689**

2. —— *Company Promoter—Underwriting Contract — Omission from Prospectus—Death before Completion of Contract—Proof against Estate—Personal Contract—Validity of Contract —Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 62), *s.* 89.

An underwriting contract by which A. agrees to place the share capital of a company is not a

BANKRUPTCY—*continued.*

contract personal to A. dependent on the continuance of his life, but is a contract which can be fulfilled by his executors, and, if A. dies before completion of the contract and his executors do not complete, damages for breach of contract may be recovered from his estate.

By an agreement dated November 30, 1912, W. agreed with a French company (1.) to form within seven days an English company with a capital of 105,000*l.* divided into 100,000 ordinary shares of 1*l.* and 100,000 participation shares of 1*s.* each, (2.) to place the ordinary share capital in three blocks of shares by certain short dates, (3.) to procure the English company to enter into a contract of purchase with the French company in the terms of an agreed draft, and (4.) that he should be at liberty to receive from the English company 5 per cent. of its ordinary shares fully paid up for forming that company and procuring the contract, and by an agreement dated December 9, 1912, W. agreed with the English company to procure the French company to enter into with it the contract of purchase in the terms of the agreed draft in consideration of being allotted 5000 fully paid up ordinary shares of the company. By another agreement also dated December 9, 1912, the French company agreed to sell to the English company certain rights in consideration (inter alia) of being paid in cash 10 per cent. of the ordinary share capital of the English company as and when subscribed, and the agreement was upon the express condition that the ordinary share capital should be subscribed in three blocks of shares by the dates specified in the agreement of November 30, 1912.

On December 10, 1912, the English company was registered with the stipulated capital and with the object of carrying into effect the two agreements of December 9, 1912. Its articles authorized the payment to any person of a commission not exceeding 10 per cent. for procuring subscriptions for its share capital. Its prospectus, issued the same day, offered 50,000 ordinary shares for subscription at par, and stated that no underwriting commission had been or would be paid, and also that part of the purchase consideration was 5000 fully paid up shares to be allotted to W. for forming the company. W. placed the first block of shares and died in February without placing any further shares. A claim by the French company to prove against his estate, which was being administered in bankruptcy, for damages for breach of the agreement of November 30, 1912, was objected to by the trustee on the grounds (1.) that that agreement was a contract personal to W. which determined at his death, and (2.) that the three agreements were one transaction which was in contravention of s. 89 of the Companies (Consolidation) Act, 1908.

Held by Horridge J. and the Court of Appeal, that the agreement of November 30 was not a contract personal to W., but was enforceable against his executors, for the breach of which damages would lie.

Held, also, that the three agreements did not form a scheme which was in contravention of s. 89 of the Companies (Consolidation) Act, 1908; and that, even if there was such a scheme, the commission of 5000 shares payable to W. was sufficiently disclosed in the prospectus. *In re* WORTHINGTON. *Ex parte* PATHÉ FRERES
C. A. 299

3. —— *Deed of Arrangement—Non-registration—Assignment for Benefit of Scheduled Creditors—Deeds of Arrangement Act*, 1887 (50 *&* 51 *Vict. c.* 57), *s.* 4, *sub-s.* 2 ; *s.* 19.

In December, 1892, a debtor convened a meeting of eighteen of his principal creditors, and in pursuance of a resolution then passed a deed of arrangement was made between the debtor of the first part, two sureties of the second part, a trustee of the third part, and the several persons whose names and seals were thereunto subscribed and affixed being respectively creditors of the debtor and thereinafter called "the creditors" of the fourth part, whereby the debtor assigned to the trustee a life policy upon trust for the payment of the debts due to the creditors with interest and covenanted to stand possessed of all moneys that he should receive from certain sources upon trust for the creditors or their trustees, and the creditors in consideration of the premises covenanted not to sue the debtor during the life of his mother. This deed was not registered under the Deeds of Arrangement Act, 1887, but an affidavit made at the time under the Act by the debtor stated that his liabilities were 9388*l.* 16*s.* 8*d.* and were due to eighteen creditors whose names and addresses were set out in a schedule to the affidavit. There were, however, four other creditors, not mentioned in the affidavit, whose debts exceeded 5000*l.* and who were no parties to the transaction. Of the eighteen creditors, thirteen executed the deed, but five did not. In 1900 the debtor became bankrupt, and all the thirteen creditors scheduled to the deed, except three of them, proved in the bankruptcy. The trustee in bankruptcy realized a considerable sum, and the creditors under the deed who had not proved in the bankruptcy claimed that the fund was subject to the trusts of the deed :—

Held, that the deed was not confined to a limited class of creditors, but was for the benefit of creditors generally, and was void for non-registration.

The principle of *General Furnishing and Upholstering Co.* v. *Venn* (1863) 32 L. J. (Ex.) 220 applied.

In re Saumarez [1907] 2 Ch. 170 distinguished. *In re* ALLIX. *Ex parte* THE TRUSTEE
Horridge J. 77

4. —— *Insolvent Traders—Transfer of Business to Private Company—Shares and Debentures—Bona fides—Approval of Majority of Creditors—Defeating or delaying Creditors—Fraudulent Conveyance—Act of Bankruptcy*—(1571) 13 *Eliz. c.* 5—*Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*b*).

Two debtors trading in partnership, whose liabilities amounted to 20,000*l.* and who were unable to meet their engagements as they fell due, assigned their business as a going concern with the approval of the majority of their

BANKRUPTCY—*continued.*

creditors to a private company for 5000*l.* in fully paid up shares and 20,000*l.* in debentures. By the articles of association of the company the two debtors were made permanent directors of the company at fixed salaries and did not vacate office if they became bankrupt. The debentures were a floating charge in common form for five years, but became immediately enforceable if the usual events happened. The majority of the creditors accepted debentures as security for their debts. Within three months the debtors became bankrupt, and the trustee in bankruptcy claimed that the assignment to the company was void as against him under the statute 13 Eliz. c. 5, and also as an act of bankruptcy under sub-s. 1 (*b*) of s. 4 of the Bankruptcy Act, 1883:—

Held, that the assignment was not void under the statute of Elizabeth, for it was made in good faith and for valuable consideration and was not in fact fraudulent or entered into with a fraudulent intent.

But *held*, that the assignment was an act of bankruptcy because it naturally tended to defeat and delay any creditors who wished to enforce their ordinary rights against the debtor's estate.

In re Harris (1906) 14 Man. 127 discussed. *In re* DAVID AND ADLARD. *Ex parte* WHINNEY - - - - - **Horridge J. 694**

5. —— *Judgment Debtor—Execution levied—Payment out direct to Judgment Creditor—Withdrawal of Sheriff—"Completion of execution"—Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 45—*Bankruptcy Act*, 1890 (53 *&* 54 *Vict. c.* 71), *s.* 11.

For the purposes of s. 45 of the Bankruptcy Act, 1883, and s. 11 of the Bankruptcy Act, 1890, an execution levied on the goods of a judgment debtor is not completed except by seizure and sale or payment of the full amount of the levy to the sheriff and the retention by the sheriff of the moneys received for fourteen days without notice of a bankruptcy petition against the debtor.

Where therefore the goods of a debtor were seized in execution and, to avoid a sale, he paid the full amount of the levy directly to the execution creditor and also paid the charges of the sheriff, who withdrew by direction of the execution creditor, and nine days afterwards the debtor became bankrupt:—

Held, that the execution had not been completed and that the creditor could not, as against the trustee in bankruptcy, retain the money which had been paid to him.

In re Pollock (1902) 87 L. T. 238, and *In re Jenkins* (1904) 90 L. T. 65; 20 Times L. R. 187, discussed. *In re* GODDING. *Ex parte* THE TRUSTEE - - - - - **Horridge J. 70**

6. —— *Mortgage of Book Debts—Receiver—Bankruptcy of Mortgagor—Notice of Assignment—Order and Disposition — Consent of True Owner—Debts due or growing due—Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 44, *sub-s.* 2 (*iii.*).

On November 29, 1913, mortgagees of the book debts of a business appointed a receiver. Negotiations at once ensued between the mortgagor and the mortgagees, the mortgagor desiring that the receiver should not give notice to the book debtors, and the mortgagees insisting on their appointment of the receiver. On December 15 the negotiations fell through, and on December 16 the receiver arranged with the mortgagor to take possession of the business the next day and instructed the mortgagor's clerk to give notice to the book debtors, which he did not do. On December 17 the receiver had notice of an act of bankruptcy committed that day by the mortgagor, and on December 29 the mortgagor was adjudged bankrupt on his own petition. Between December 22 and 29 the receiver gave notice to the book debtors:—

Held, that the book debts were at the commencement of the bankruptcy (December 17) in the order and disposition of the bankrupt with the consent of the true owners, for that the receiver could have given notice between November 29 and December 17 to the book debtors.

Rutter v. *Everett* [1895] 2 Ch. 872 discussed. *In re* NEAL. *Ex parte* THE TRUSTEE **Horridge J. 910**

7. —— *Practice — Application by Trustee against Third Party—No Committee of Inspection—No Sanction by Board of Trade—Objection to Procedure—Bankruptcy Act*, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 22, *sub-s.* 9; *s.* 57, *sub-s.* 3; *s.* 73, *sub-s.* 3; *ss.* 89, 90—*Bankruptcy Act*, 1890 (53 *&* 54 *Vict. c.* 71), *s.* 15, *sub-s.* 3—*Bankruptcy Rules*, 1886 *and* 1890, *r.* 117.

Sect. 22, sub-s. 9, and s. 57 of the Bankruptcy Act, 1883, and s. 15 of the Bankruptcy Act, 1890, which require a trustee in bankruptcy, before taking any proceedings or employing a solicitor, to obtain the sanction of the committee of inspection or of the Board of Trade, are provisions for the protection of the estate, as between the trustee and the estate, on matters relating to his costs, charges, and expenses, and afford no defence to any proceeding which the trustee, without such sanction, may institute against other parties. *In re* BRANSON. *Ex parte* THE TRUSTEE - - **Horridge J. 701**

BANKRUPTCY RULES, 1886 and 1890) r. 117 - - - - - - 701
See BANKRUPTCY. 4.

BATTERSEA—Metropolis Management (Battersea and Westminster) Act, 1887, s. 4
See LONDON. 2. 89

BETTING.
See under GAMING.

BILL OF COSTS—Solicitor.
See under SOLICITOR.

BOARD OF TRADE—No sanction by—Bankruptcy—Practice - - - 701
See BANKRUPTCY. 7.

BOOK DEBTS — Mortgage of — Receiver — Bankruptcy of mortgagor—Notice of assignment—Order and disposition—Consent of true owner—Debts due or growing due - - - - 910
See BANKRUPTCY. 6.

BREACH OF COVENANT.
See under COVENANT.

BREWERS' DRAYMAN—Workmen's compensation - - - - - - - 227
See EMPLOYER AND WORKMAN. 1.

BREWERY—Income tax—Tied houses—Repairs—Insurance premiums—Loss on rents—Legal expenses - - - - 891
See REVENUE. 4.

BROKER — Banker — Deposit of securities by broker—Authority of broker to pledge—Estoppel—Purchase for value in good faith - - - - - - - 168
See BANKER.

BUILDINGS—*By-laws—Infringement—Part of Old Building pulled down and New Part erected — "New building" — Plans of whole Building—Local Government — Public Health Acts Amendment Act*, 1907 (7 *Edw.* 7, *c.* 53), *s.* 23.

Sect. 23 of the Public Health Acts Amendment Act, 1907, provides as follows: "For the purposes of this Act and the Public Health Acts, and any by-laws made thereunder, each of the following operations, namely: (*a*) the re-erection, wholly or partially, of any building of which an outer wall is pulled down or burnt down to or within ten feet of the surface of the ground adjoining the lowest storey of the building . . . . shall be deemed to be the erection of a new building."

A local authority's by-law provided that "Every person who shall intend to erect a building shall give to the council notice in writing of such intention . . . . and shall at the same time deliver or send . . . . complete plans and sections of every floor of such intended building . . . ."

The respondents pulled down part of an old building including certain outer walls, leaving the remaining part of the premises standing. The old part of the premises was erected before building by-laws came into existence. The respondents gave notice in writing to the local authority of their intention to erect on the site of the part pulled down a new part, and with that notice they sent plans and sections of the new part, but they gave no notice as to, or plans or sections of, the whole building, that is, the part left standing and the new part:—

Held, that under s. 23 of the Public Health Acts Amendment Act, 1907, the whole building, that is, the old part and the new part, was to be deemed to be a new building, and therefore the respondents were bound to send notice as to, and plans and sections of, the whole building to the local authority. LEONARD v. HOARE & CO., LIMITED - - - - - **Div. Ct. 798**

—— Building notice — New buildings—Public elementary school—Alterations - 803
See LONDON. 1.

BUSINESS—Stamp duty—Agreement — Sale of business — Debts owing by persons resident abroad - - - - 404
See REVENUE. 7.

BY-LAWS—Buildings—By-laws— Infringement—Part of old building pulled down and new part erected—"New building"—Plans of whole building—Local government - - - - - - - 798
See BUILDINGS.

—— Corporation — Wilful obstruction of corporation's servants in execution of their duty— Regulation prohibiting passengers riding on top of motor omnibuses on part of route—Refusal of passenger to descend from top—Delay of omnibus - - - - - - - 762
See CORPORATION.

CARRIER—Railway company—Undue preference by, of themselves as carriers—Legitimate competition—Through rate
See RAILWAY. 2. 192

CASES:—

—— *Allcock* v. *Hall* - [1891] 1 Q. B. 444
Followed. SKEATE *v.* SLATERS, LIMITED - - [1914] **2 K. B. 429**

—— *Allen* v. *Inland Revenue Commissioners* [1914] 1 K. B. 327.
Affirmed - - [1914] **2 K. B. 327**

—— *Associated Newspapers, Limited* v. *City of London Corporation* [1913] 2 K. B. 281.
Reversed - - [1914] **2 K. B. 603**

—— *Barnhart* v. *Greenshields* (1853) 9 Moo. P. C. 18.
Explained. REEVES *v.* POPE [1914] **2 K. B. 284**

—— *Blackmore* v. *Mile End Old Town (Vestry of)* (1882) 9 Q. B. D. 451.
Followed. PAPWORTH *v.* BATTERSEA CORPORATION - [1914] **2 K. B. 89**

—— *Blyth* v. *Hulton* - (1908) 72 J. P. 401
Distinguished. SCOTT *v.* DIRECTOR OF PUBLIC PROSECUTIONS [1914] **2 K. B. 868**

—— *Brickwood & Co.* v. *Reynolds* [1898] 1 Q. B. 95 is not inconsistent with or overruled by *Smith* v. *Lion Brewery Co.* [1911] A. C. 150. USHER'S WILTSHIRE BREWERY, LIMITED *v.* BRUCE [1914] **2 K. B. 891**

—— *Bulli Coal Mining Co.* v. *Osborne* [1899] A. C. 351.
Followed. OELKERS *v.* ELLIS [1914] **2 K. B. 139**

—— *Calico Printers Association* v. *Booth* [1913] 3 K. B. 652.
Explained. GOTOBED *v.* PETCHELL [1914] **2 K. B. 36**

—— *Churchward* v. *Coleman* (1866) L. R. 2 Q. B. 18.
Followed. REX *v.* MELLOR [1914] **2 K. B. 588**

—— *Colonial Bank* v. *Cady* (1890) 15 App. Cas. 267.
Applied. FULLER *v.* GLYN, MILLS, CURRIE & CO. - [1914] **2 K. B. 168**

CASES—*continued.*

—— *Cowley* v. *Newmarket Local Board* [1892] A. C. 345.
Followed. Papworth *v.* Battersea Corporation - [1914] **2 K. B. 89**

—— *Cox* v. *Leigh* . (1874) L. R. 9 Q. B. 333
Approved. Lewis *v.* Davies [1914] **2 K. B. 469**

—— *Danubian Sugar Factories* v. *Inland Revenue Commissioners* [1901] 1 K. B. 245.
The decision of the Court of Appeal in, has not been overruled by *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine* [1901] A. C. 217. Velazquez, Limited *v.* Inland Revenue Commissioners - [1914] **2 K. B. 404**

—— *General Furnishing and Upholstering Co.* v. *Venn* (1863) 32 L. J. (Ex.) 220.
The principle of, applied. *In re* Allix. *Ex parte* The Trustee [1914] **2 K. B. 77**

—— *Gibbs* v. *Guild* - (1882) 9 Q. B. D. 59
Discussed. Oelkers *v.* Ellis [1914] **2 K. B. 139**

—— *Harris* v. *Beauchamp Brothers* [1894] 1 Q. B. 801.
Followed. Morgan *v.* Hart [1914] **2 K. B. 183**

—— *Haworth* v. *Andrew Knowles & Sons* (1903) 19 Times L. R. 658.
Distinguished. Allen *v.* Great Eastern Railway Company [1914] **2 K. B. 243**

—— *Heard* v. *Pickthorne* [1913] 3 K. B. 299
Distinguished. Bailey *v.* Insurance Section of the Co-operative Wholesale Society [1914] **2 K. B. 233**

—— *Huggett* v. *Miers* - [1908] 2 K. B. 278
Followed. Lucy *v.* Bawden [1914] **2 K. B. 318**

—— *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine* [1901] A. C. 217.
Discussed. Velazquez, Limited *v.* Inland Revenue Commissioners [1914] **2 K. B. 404**

—— *Jenkins, In re* (1904) 90 L. T. 65 ; 20 Times L. R. 187.
Discussed. *In re* Godding. *Ex parte* The Trustee - [1914] **2 K. B. 70**

—— *Kirkheaton District Local Board* v. *Ainley* [1892] 2 Q. B. 274.
Referred to. Rochford Rural District Council *v.* Port of London Authority - [1914] **2 K. B. 916**

—— *Lewis* v. *G. Davies; E. Davies, Claimant* [1913] 2 K. B. 37.
Reversed - - [1914] **2 K. B. 469**

—— *London Corporation* v. *Netherlands Steamboat Co.* [1906] A. C. 263, 271.
Referred to. Associated Newspapers, Limited *v.* City of London Corporation - - [1914] **2 K. B. 603**

—— *London Joint Stock Bank* v. *Simmons* [1892] A. C. 201.
Followed. Fuller *v.* Glyn, Mills, Currie & Co. - [1914] **2 K. B. 168**

—— *Maynard* v. *Gibson* - [1876] W. N. 204
Followed. Payne *v.* Countess of Warwick. Tyndale-White and Another, Claimants [1914] **2 K. B. 486**

—— *Millar* v. *Radford* (1903) 19 Times L. R. 575.
Referred to. Nightingale *v.* Parsons - - - [1914] **2 K. B. 621**

—— *Millar* v. *Toulmin* (1886) 17 Q. B. D. 603
Followed. Skeate *v.* Slaters, Limited - - [1914] **2 K. B. 429**

—— *Miller* v. *Hancock* - [1893] 2 Q. B. 177
Considered and distinguished. Lucy *v.* Bawden - [1914] **2 K. B. 318**

—— *Molloy* v. *Mutual Reserve Life Insurance Co.* (1906) 94 L. T. 756.
Followed. Oelkers *v.* Ellis [1914] **2 K. B. 139**

—— *Nelson* v. *James Nelson & Sons, Limited* [1913] 2 K. B. 471.
Affirmed - - [1914] **2 K. B. 770**

—— *Paquin* v. *Beauclerk* - [1906] A. C. 148
Followed. Skeate *v.* Slaters, Limited - [1914] **2 K. B. 429**

—— *Peters* v. *Perry* (1894) 10 Times L. R. 366
Considered. Skeate *v.* Slaters, Limited - - [1914] **2 K. B. 429**

—— *Pollock, In re* - - (1902) 87 L. T. 238
Discussed. *In re* Godden. *Ex parte* The Trustee - [1914] **2 K. B. 70**

—— *Rayson* v. *South London Tramways Co.* [1893] 2 Q. B. 304.
Followed. Wiffen *v.* Bailey and Romford Urban District Council [1914] **2 K. B. 5**

—— *Reeves* v. *Pope* - - [1913] 1 K. B. 637
Affirmed - [1914] **2 K. B. 284**

—— *Reg.* v. *King* - [1897] 1 Q. B. 214
Explained and distinguished. Rex *v.* Barron - - - [1914] **2 K. B. 570**

—— *Reg.* v. *Riley* - [1896] 1 Q. B. 309
Followed. Rex *v.* Cade [1914] **2 K. B. 209**

—— *Reg.* v. *Staines Local Board* (1888) 60 L. T. 261.
Distinguished. Rochford Rural District Council *v.* Port of London Authority - [1914] **2 K. B. 916**

—— *Rex* v. *Customs and Excise Commissioners* [1913] 3 K. B. 483.
Affirmed - - - [1914] **2 K. B. 390**

—— *Rex* v. *London Gas Light Co.* (1828) 8 B. & C. 54.
Referred to. Associated Newspapers, Limited *v.* City of London Corporation - [1914] **2 K. B. 603**

CASES—*continued.*

—— *Russell* v. *Town and County Bank* (1888) 13 App. Cas. 418.
Followed and applied. General Hydraulic Power Company, Limited *v.* Hancock [1914] **2 K. B. 21**

—— *Rutter* v *Everett* - [1895] 2 Ch. 872
Discussed. *In re* Neal. *Ex parte* The Trustee - [1914] **2 K. B. 910**

—— *St. Nazaire & Co., In re* (1879) 12 Ch. D. 88
Followed. Hession *v.* Jones [1914] **2 K. B. 421**

—— *Saumarez, In re* - [1907] 2 Ch. 170
Distinguished. *In re* Allix. *Ex parte* The Trustee - [1914] **2 K. B. 77**

—— *Sion College* v. *London Corporation* [1901] 1 K. B. 617.
Considered. Associated Newspapers, Limited *v.* City of London Corporation - [1914] **2 K. B. 603**

Followed. Associated Newspapers, Limited *v.* City of London Corporation (No. 2) - [1914] **2 K. B. 822**

—— *Smelting Co. of Australia* v. *Inland Revenue Commissioners*, [1897] 1 Q. B. 175.
The decision of the Court of Appeal in, has not been overruled by *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine* [1901] A. C. 217. Velazquez, Limited *v.* Inland Revenue Commissioners - [1914] **2 K. B. 404**

—— *Smith* v. *Baker* - [1891] A. C. 325
Applied. Taylor *v.* National Amalgamated Approved Society [1914] **2 K. B. 352**

—— *Smith* v. *Lion Brewery Co.* [1911] A. C. 150.
Considered and explained. Usher's Wiltshire Brewery, Limited *v.* Bruce - - - [1914] **2 K. B. 891**

—— *Tapster* v. *Ward* - (1909) 101 L. T. 503
Followed. *In re* Phillips [1914] **2 K. B. 689**

—— *Thames Conservators* v. *Gravesend Corporation* [1910] 1 K. B. 442.
Referred to. Rochford Rural District Council *v.* Port of London Authority [1914] **2 K. B. 916**

—— *Tyler, In re* - [1907] 1 K. B. 865
Distinguished. *In re* Phillips [1914] **2 K. B. 689**

—— *Usher's Wiltshire Brewery, Limited* v. *Bruce* [1914] 1 K. B. 357.
Affirmed - [1914] **2 K. B. 891**

—— *Waltham Holy Cross Urban District Council* v. *Lee Conservancy Board* (1910) 103 L. T. 192.
Referred to. Rochford Rural District Council *v.* Port of London Authority [1914] **2 K. B. 619**

CASES—*continued.*

—— *White* v. *Hindley Local Board* (1875) L. R. 10 Q. B. 219.
Followed. Papworth *v.* Battersea Corporation - [1914] **2 K. B. 89**

—— *Williams* v. *Heales* (1874) L. R. 9 C. P. 177
The decision in, was founded upon estoppel. Stratford-upon-Avon Corporation *v.* Parker [1914] **2 K. B. 562**

—— *Yorkshire (North Riding of) County Council* v. *Middlesbrough County Borough Council* [1913] 1 K. B. 93.
Varied - - [1914] **2 K. B. 847**

—— *Yorkshire West Riding Council* v. *Holmfirth Urban Sanitary Authority* [1894] 2 Q. B. 842.
Referred to. Rochford Rural District Council *v.* Port of London Authority - - [1914] **2 K. B. 916**

CASUAL LABOURER—Workmen's compensation—Basis of calculation - - **291**
See Employer and Workman. 2.

CERTIFICATE—National Insurance Act, 1911—Medical certificate that member suffering from "debility"—Sufficiency of certificate—Dispute between member and society - - - - **233**
See Insurance (Health).

CHILD.
See under Infant.

CHILDREN ACT, 1908, s. 58, sub-s. 3 - **494**
See Infant.

—— ss. 102, 106, 131 - - - - **378**
See Criminal Law. 2.

CHURCH.
See under Ecclesiastical Law.

CHURCH RATE—Rate authorized by local Act
See Ecclesiastical Law. **660**

CLOSING HOURS—Licensing Acts—Populous place - - - - - - **705**
See Licensing Acts. 1.

COAL—Coal Mines (Minimum Wage) Act 1912 - - - - - **461, 497**
See Mine. 1, 2.

COMMISSION—House agent—Lease of house—Subsequent sale to tenant—"Efficient cause of sale" - - - - **621**
See Principal and Agent.

COMMITTEE OF INSPECTION—Bankruptcy—Practice - - - - - **701**
See Bankruptcy. 7.

COMPANY—*Articles of Association—Board of Directors—Powers—Appointment of Managing Director—Power to revoke Appointment.*
The articles of association of the defendant company provided that the board of directors might appoint one of their number to be managing director for such period as they deemed fit, and might revoke the appointment. The board

COMPANY—*continued.*

appointed the plaintiff to be managing director upon the terms of an agreement which provided that he should hold the office so long as he should remain a director of the company and retain his due qualification and efficiently perform the duties of the office. Subsequently, while the plaintiff was still fulfilling the conditions of the agreement, the board revoked the appointment. The plaintiff sued the company for damages for breach of agreement :—

Held, that the articles of association did not empower the board to revoke the appointment at will, or otherwise than in accordance with the terms of the agreement under which the plaintiff was appointed managing director, and that the plaintiff was entitled to recover damages against the company.

Judgment of Scrutton J. [1913] 2 K. B. 471 affirmed. NELSON *v.* JAMES NELSON & SONS, LIMITED - - - - - - - **C. A. 770**

—— Bankruptcy—Company promoter—Underwriting contract—Omission from prospectus — Death before completion of contract — Proof against estate—Personal contract—Validity of contract **299**
See BANKRUPTCY. 2.

—— Contempt of Court—Attachment—Motion for, against limited company - **866**
See CONTEMPT OF COURT.

—— Insolvent traders—Transfer of business to private company — Fraudulent conveyance - - - - - - **694**
See BANKRUPTCY. 4.

—— Workmen's compensation —Accident fund —Scheme — Construction —Dependant —Committee of accident fund — Decision final — Appeal to Court of Appeal—Jurisdiction - - - **243**
See EMPLOYER AND WORKMAN. 3.

COMPENSATION—Licensing Acts.
See under LICENSING ACTS.

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

COMPROMISE—Solicitor and client—Retainer to conduct action—Authority to compromise after judgment — Assent to assignment by defendant for benefit of creditors - - - - - **758**
See SOLICITOR. 3.

CONSOLIDATED WORKMEN'S COMPENSATION RULES, July, 1913, r. 44 (3) **257**
See EMPLOYER AND WORKMAN. 8.

CONTEMPT OF COURT—*Attachment—Motion for, against Limited Company.*

Although upon a rule calling upon a limited company to shew cause why a writ of attachment should not issue against it for contempt of Court, the Court cannot make an order of attachment, it can, where it is satisfied that a contempt has been committed, inflict the appropriate punishment, namely, order the company to pay a fine. REX *v.* J. G. HAMMOND & Co., LIMITED - - - **Div. Ct. 866**

CONTRACT — Dock — Contract for use of — Unfitness of equipment of dock — Damage to ship—Exemption clause in general words —Liability of dock owner **788**
See DOCK.

—— Rescission — Fraud — Concealed fraud — Statutes of Limitation - - **139**
See LIMITATION, STATUTES OF.

—— Solicitor—Illegal agreement—Permitting name to be used for profit of unqualified person - - - - - - **411**
See SOLICITOR. 2.

—— Stamp duty—Agreement—Sale of business — Debts owing by persons resident abroad - - - - - - **404**
See REVENUE. 7.

CONTRACT OF SERVICE—Workmen's compensation — "Concurrent contracts of service"— Ejusdem generis - **53**
See EMPLOYER AND WORKMAN. 4.

CONTRIBUTORY NEGLIGENCE.
See under NEGLIGENCE.

CONVEYANCING AND LAW OF PROPERTY —Landlord and tenant—Covenant to repair—Notice of breach—Sufficiency of notice - - - - - - **109**
See LANDLORD AND TENANT. 4.

CORPORATION—*By-law—Wilful Obstruction of Corporation's Servants in Execution of their Duty—Regulation prohibiting Passengers riding on Top of Motor Omnibuses on Part of Route—Refusal of Passenger to descend from Top—Delay of Omnibus.*

The E. Corporation, who had statutory authority to run motor omnibuses, made a regulation prohibiting on one section of a particular route passengers riding on the top of the omnibuses. The regulation was made for the safety of passengers in view of the camber of the road, and notice thereof was exhibited on the top of the omnibuses, but attention was not drawn thereto on passengers' tickets. The appellant, who had previous knowledge of the regulation, was an outside passenger on an omnibus on the particular route and had paid the fare entitling him to travel over the section to which the regulation applied. When the omnibus reached the beginning of that section he refused to come down from the top although his attention was again called to the notice on the omnibus by the conductor and an inspector, the appellant stating that he had got his ticket and intended riding on the top to the terminus. The inspector declined to allow the omnibus to proceed while the appellant remained on the top, and it was thereby delayed twenty minutes. The appellant having been convicted of a breach of the corporation's by-law which provided that "No passenger or other person shall wilfully obstruct or impede any officer or servant of the council in the execution of his duty upon or in connection with any motor omnibus" :—

Held, that the appellant was not entitled to be carried on the top of the omnibus on the part of the route to which the regulation

CORPORATION—*continued.*
applied inasmuch as the corporation had not, in respect of that part of the route, held themselves out as common carriers of passengers on the top of their omnibuses, or contracted to carry the appellant on the top of the omnibus; that the appellant's conduct amounted to wilful obstruction of the conductor and inspector within the meaning of the by-law; and, therefore, that the conviction was right. BAKER *v.* ELLISON **Div. Ct. 762**

COSTS—*Taxation—Plaintiff's Travelling and Personal Expenses—Condition of Allowance—Jurisdiction of Taxing Master—Practice.*

A plaintiff who lived at Florence recovered judgment in an action. Upon taxation of the plaintiff's costs as between party and party the taxing Master fixed a certain sum as proper to be allowed in respect of the plaintiff's travelling and hotel expenses, &c., but made it a condition of its inclusion in his allocatur that the plaintiff's solicitors should produce to him either a voucher acknowledging the receipt by the plaintiff from his solicitors of the said sum or a letter from the plaintiff intimating that he had knowledge of the amount as allowed:—

Held by Buckley L.J. and Kennedy L.J. (Vaughan Williams L.J. dissenting), that the taxing Master was entitled to impose the condition on the allowance of the sum in his allocatur.

Per Curiam: The taxing Master's allocatur not having in fact been given, the plaintiff was wrong in taking out a summons before a judge in chambers to set aside the decision of the taxing Master in respect of the items complained of. HARBIN *v.* GORDON - - **C. A. 577**

—— Creation of county borough - - **847**
See LOCAL GOVERNMENT. 1.

—— Solicitors' costs.
See under SOLICITOR.

COUNTY BOROUGH—Creation of—Costs - **847**
See LOCAL GOVERNMENT. 1.

COUNTY COURT—*Jury, Action tried with—Verdict and Judgment for Plaintiff—Application for New Trial on Ground of no Evidence—Power of County Court Judge to grant New Trial—County Courts Act,* 1888 (51 *&* 52 *Vict. c.* 43), *s.* 93.

A county court judge, who at the trial of an action with a jury has ruled that there is evidence for the jury and has entered judgment for the plaintiff in accordance with the verdict, has no power to grant a new trial on the ground that there was no evidence for the jury. CLARKE *v.* WEST HAM CORPORATION - **Div. Ct. 448**

2. —— *Practice—Appeal—Point of Law not raised in County Court—Point going to Jurisdiction of the Court—National Insurance Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 55), *s.* 67—*National Insurance Act,* 1913 (3 *&* 4 *Geo.* 5, *c.* 37), *s.* 27.

The rule that there is no appeal from a county court except upon a point of law taken in that Court applies even when the ground of appeal is that the jurisdiction of the county court in the matter in question has been ousted by a public statute.

By s. 67 of the National Insurance Act, 1911, subject to certain provisions not material, every dispute between an approved society and an insured person who is a member of such society relating to anything done or omitted by such person or society is to be decided according to the rules of the society. The rules of the defendant society provided that disputes between insured members and the society should be decided by arbitration.

By s. 27 of the National Insurance Act, 1913, any dispute between an approved society and any person as to whether that person is or was at any date a member of that society is to be decided in like manner as a dispute between an approved society and an insured person who is a member thereof and s. 67 of the Act of 1911 is to apply accordingly.

The plaintiff claimed to be a member of the defendant society and as such entitled to payments under a contract of insurance with the society, who denied that the plaintiff was a member. The plaintiff brought an action in the county court. The defendants gave notice of a special defence under s. 67 of the National Insurance Act, 1911, insisting that the county court had no jurisdiction in the matter. The county court judge gave judgment for the plaintiff, holding that s. 67 of the Act of 1911 only applied to disputes between the society and one who was admittedly a member thereof. Sect. 27 of the Act of 1913 was not brought to the attention of the county court judge. The defendants appealed on the ground that the jurisdiction of the county court was ousted by s. 27 of the Act of 1913:—

Held, that this point not having been taken in the county court could not be raised on appeal, and that the decision of *Smith* v. *Baker* [1891] A. C. 325 applied, even though the point under appeal was one touching the jurisdiction of the county court. TAYLOR *v.* NATIONAL AMALGAMATED APPROVED SOCIETY - **Div. Ct. 352**

3. —— *Remitted Action—Refusal of Judge to try—"Court convenient thereto"—Duty of County Court Judge—County Courts Act,* 1888 (51 *&* 52 *Vict. c.* 43), *s.* 65.

By s. 65 of the County Courts Act, 1888, "where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed 100*l.* . . . . it shall be lawful for either party to the action . . . . to apply to a judge of the High Court at chambers to order such action to be tried in any Court in which the action might have been commenced, or in any Court convenient thereto; and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly":—

Held, that the words "in any Court convenient thereto" mean in any county court which the judge at chambers may deem to be convenient to the parties; and the judge has a discretion to exercise upon the question of convenience which must vary according to the circumstances of each case.

COUNTY COURT—*continued.*

Where an order is made under the above section for the trial of an action in a county court, the county court judge has no jurisdiction to inquire into what circumstances were taken into account when the order was made, or into the question whether his Court is a convenient Court or is convenient to the parties, or whether any other Court would be more convenient, or the like. His duty is to obey the order and try the action in due course as if it had been an action originally commenced in his Court. It can only occur in an exceptional case that an order under s. 65 may possibly be made without jurisdiction, and if the county court judge is of opinion that the order is invalid for want of jurisdiction, it is his duty to give a judgment on the point with reasons, stating fully the grounds upon which he has come to the conclusion that the order has been made without jurisdiction; and he should then adjourn the hearing to enable either party to raise the question of jurisdiction in the High Court, if he should desire to do so.

Where the High Court makes an order under s. 131 of the County Courts Act, 1888, directing a county court judge to hear and determine an action which he has refused to hear, the Court can only deal with the costs of the proceedings before it, and has no jurisdiction to order the county court judge to pay the costs thrown away in the county court by reason of his refusal to hear the action.

Churchward v. *Coleman* (1866) L. R. 2 Q. B. 18 followed. Rex *v.* Mellor - - **C. A. 588**

—— Appeal from county court—Non-appearance of respondent—Motion to reinstate—Jurisdiction of High Court - - **421**
See Practice. 1.

—— Landlord and tenant—Surrender of tenancy—Tenant remaining in possession—Execution—Claim by landlord for rent
See Landlord and Tenant. 6. **469**

—— Workmen's compensation—National Insurance Act, 1911, s. 11—Notice to "parties interested"—Notice sent to approved society—Appearance before county court judge—Objection to locus standi - - - - - - - **257**
See Employer and Workman. 8.

COVENANT—"Assessments charged on the premises"—Covenant by lessee—Inhabited house duty—Landlord assessed by mistake—Payment by landlord—Implied request - - - - - **361**
See Landlord and Tenant. 2.

—— Lease — Repairing covenant — Death of assignee intestate — Executor de son tort—Liability - - - - - **562**
See Landlord and Tenant. 3.

—— Repair, Covenant to—Notice of breach—Specification of particular breach complained of—Addition of general clause—Sufficiency of notice - - **109**
See Landlord and Tenant. 4.

CREDITOR—Bankruptcy.
See under Bankruptcy.

—— Bankruptcy—Insolvent traders—Transfer of business to private company—Shares and debentures—Bona fides—Approval of majority of creditors—Defeating or delaying creditors — Fraudulent conveyance—Act of bankruptcy - **694**
See Bankruptcy. 4.

CRIMINAL LAW—*Attempted Suicide—Whether punishable with Hard Labour—"Attempt to commit felony"—Hard Labour Act*, 1822 (3 *Geo.* 4, *c.* 114).

An attempt to commit suicide is an attempt to commit felony within the meaning of the Hard Labour Act, 1822, and is punishable with hard labour accordingly. Rex *v.* Mann
C. C. A. 107

2. —— *Child — Conviction for Larceny—Sentence—Power to order Child to be whipped—Officer to administer Whipping—Larceny Act*, 1861 (24 *&* 25 *Vict. c.* 96), *s.* 4—*Children Act*, 1908 (8 *Edw.* 7, *c.* 67), *ss.* 102, 106, 131.

The provision of s. 4 of the Larceny Act, 1861, by which, in the case of a male person under the age of sixteen years who has been convicted of simple larceny, the punishment of whipping may be superadded to a sentence of imprisonment or penal servitude, has not been impliedly repealed by the Children Act, 1908, under which a child—that is a person under the age of fourteen years—cannot be sentenced to imprisonment or penal servitude, but can be sentenced to detention in a place of detention. Where, therefore, a male child has been sentenced to detention in a place of detention he may also be ordered to be whipped.

As in the Children Act, 1908, there is no person specifically charged with the duty of administering the punishment of whipping in the case of a child convicted on indictment and ordered to be whipped and sentenced to detention in a place of detention, the duty devolves upon the sheriff as the officer who has the general duty of executing the orders of Courts of justice. The sheriff may, however, depute the performance of this duty to a proper person. Rex *v.* Lydford - - - **C. C. A. 378**

3. —— *Forgery—Obtaining Money by Forged Instrument—Letter asking for Money—Forgery Act*, 1913 (3 *&* 4 *Geo.* 5, *c.* 27), *s.* 7—"*Instrument.*"

The prisoner was indicted under s. 7 of the Forgery Act, 1913, for obtaining certain money by means of "a certain forged instrument to wit a forged request for the payment of one pound." The document in question was a letter purporting to come from, and to be signed by a man employed by, the prosecutor to whom it was addressed. The letter requested the prosecutor to hand to the bearer the sum of 1*l.* which the letter stated was required for the purpose of hiring a machine with which to clear out a drain on premises belonging to the prosecutor:—

Held, that the letter was an "instrument" within the meaning of s. 7.

Reg. v. *Riley* [1896] 1 Q. B. 309 followed. Rex *v.* Cade - - - - **C. C. A. 209**

CRIMINAL LAW—*continued.*

4. —— *Indictment—Joinder of Counts for Separate Felonies—Discretion of Judge to put Prosecution to Election or quash Indictment.*

There is no rule of law that separate and distinct felonies cannot be tried together in one indictment. As a matter of practice and procedure the judge presiding at the trial can in the exercise of his discretion quash the indictment or call upon the prosecution to elect upon which of the counts for felony they will proceed, in order to safeguard the interests of the prisoner and to prevent him from being embarrassed by being put upon his trial upon an indictment in which there are several counts for distinct felonies. In exercising his discretion as to putting the prosecution to their election, the material element to which the judge should direct his attention is whether the overt acts relied on as proving the different offences charged are in substance the same. REX *v.* LOCKETT, GRIZZARD, GUTWIRTH, AND SILVERMAN - - **C. C. A. 720**

5. ——*Living on Earnings of Prostitution—Indictment—Jurisdiction of Quarter Sessions to try—Charge in respect of one specified Day only—Validity of Indictment—Vagrancy Act*, 1898 (61 *&* 62 *Vict. c.* 39), *s.* 1—*Criminal Law Amendment Act*, 1912 (2 *&* 3 *Geo.* 5, *c.* 20), *s.* 7.

An indictment, under sub-s. 5 of s. 7 of the Criminal Law Amendment Act, 1912, for the offence of knowingly living on the earnings of prostitution, can be tried by a Court of quarter sessions.

In an indictment for this offence a person can properly be charged with having committed the offence on one specified day only. REX *v.* HILL. REX *v.* CHURCHMAN - **C. C. A. 386**

6. —— *Plea—Autrefois Acquit—Peril of Conviction on Previous Charge—Two Offences substantially the same.*

To establish a plea of autrefois acquit it must be shewn either that the defendant had been previously acquitted of the same offence, or could have been convicted at the previous trial of the offence with which he is subsequently charged, or that the two offences are substantially the same.

Reg. v. *King* [1897] 1 Q. B. 214 explained and distinguished. REX *v.* BARRON - **C. C. A. 570**

7. —— *Pleading—Indictment—Duplicity—Objection — Appeal — "No substantial miscarriage of justice"—Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4, *sub-s.* 1.

An indictment under the Punishment of Incest Act, 1908, charged in one count that offences were committed "on divers days between the month of January, 1909, and October 4, 1910," and in another count that offences were committed "on divers days between October 4, 1910, and the end of February, 1913." At the trial, after the prisoner had pleaded not guilty and the jury had been sworn, objection was taken that the indictment was bad for duplicity. The objection was overruled and the prisoner was convicted. On appeal:—

Held, that the indictment was bad in that it charged more than one offence in each count, but that as the prisoner had not in fact been embarrassed or prejudiced in his defence by the presentment of the indictment in this form, there had been no "substantial miscarriage of justice," and that the appeal must, therefore, be dismissed under s. 4, sub-s. 1, of the Criminal Appeal Act, 1907.

Quære, whether an objection that an indictment is bad on its face can be taken after plea or after verdict? REX *v.* THOMPSON **C. C. A. 99**

—— Child—Prosecution of—Power to send to industrial school - - - - - **494**
See INFANT.

—— Malicious prosecution.
See under MALICIOUS PROSECUTION.

DAMAGE AND DAMAGES—Dock—Contract for use of—Unfitness of equipment of dock—Damage to ship—Exemption clause in general words—Liability of dock owner - - - - - **788**
See DOCK.

—— Landlord and tenant—Rent—Damages—Action by mortgagees in possession for rent — Right of tenant to set off damages claimed from lessor - **284**
See LANDLORD AND TENANT. 5.

—— Malicious prosecution—Damage necessary to support action for—Damage to reputation - - - - - **5**
See MALICIOUS PROSECUTION.

DANGEROUS PREMISES—Negligence—House let out in separate floors—Flight of steps in possession of landlord—Steps insufficiently fenced—Liability - **318**
See NEGLIGENCE.

DEBTOR—Bankruptcy.
See under BANKRUPTCY.

DEBTS—Parties—Action of debt against unincorporated society—Order authorizing one or more to defend on behalf of all
See PRACTICE. 3. **930**

—— Stamp duty—Agreement—Sale of business—Debts owing by persons resident abroad - - - - - - **404**
See REVENUE. 7.

DEDUCTIONS—Income tax.
See under REVENUE.

DEED OF ARRANGEMENT — Bankruptcy — Non-registration — Assignment for benefit of scheduled creditors - **77**
See BANKRUPTCY. 3.

DEER—Tenant for life and remainderman—Deer in a park—Consumable things—Validity of gift over - - - **486**
See WILL.

DEPENDANT—Workmen's compensation. **243**
See EMPLOYER AND WORKMAN. 3.

DEPOSIT—Banker—Deposit of securities by broker—Authority of broker to pledge—Estoppel—Purchase for value in good faith - - - - - - - **168**
See BANKER.

DIRECTORS—Company.
See under COMPANY.

DISBURSEMENTS—Passage money — Loss — Subsequent earning of other passage money—Salvage.
See under INSURANCE (MARINE).

DISCHARGE—Bankrupt - - - - - **689**
See BANKRUPTCY. 1.

DISCRETION—"Uncontrolled discretion" of trustees—Maintenance and education—Income tax—Foreign possessions—Property settled on infants - - **643**
See REVENUE. 2.

DISEASE—Industrial disease — Workmen's compensation - - - - **213**
See EMPLOYER AND WORKMAN. 6.

DISPUTE—Seaman—Discharge—Jurisdiction
See SHIPPING. **455**

DISTRESS—*Rent — Exemptions — Goods of Stranger—"Goods comprised in hire-purchase agreement"—Law of Distress Amendment Act,* 1908 (8 *Edw.* 7, *c.* 53), *s.* 4.

The plaintiffs let furniture to the tenant of a flat under a hire-purchase agreement which provided that: "If the hirer does not duly perform and observe this agreement, the same shall ipso facto be determined, and the hirer shall forthwith . . . . return the said goods to the owners, and the owners shall be entitled to retake possession of the same as being goods wrongfully detained by the hirer, and for that purpose to enter on any premises where the goods may be."

The hirer having fallen into arrear with his weekly payments under the agreement, the plaintiffs served upon him a written notice that the agreement was terminated and demanding the return of the goods; and they endeavoured unsuccessfully to retake possession. On the next day the landlord distrained upon the goods for arrears of rent of the flat where the goods were:—

Held, that the goods were at the time of the distress "comprised in a hire-purchase agreement," within the meaning of s. 4 of the Law of Distress Amendment Act, 1908, and therefore were not protected from distress by ss. 1 and 2 of the Act. JAY'S FURNISHING COMPANY *v.* BRAND & CO. - - - - **Div. Ct. 132**

DOCK—*Contract for Use of—Unfitness of Equipment of Dock—Damage to Ship—Exemption Clause in General Words—Liability of Dock Owner.*

The defendants were the owners of a graving dock, which the plaintiffs' ship used under a contract for reward. By the terms of the contract the defendants supplied the necessary blocks for supporting the vessel when in the dock. The contract also provided that "The owner of a vessel using the graving dock must do so at his own risk, it being hereby expressly provided that the company are not to be responsible for any accident or damage to a vessel . . . . whilst in the graving dock, whatever may be the nature of such accident or damage or howsoever arising." Owing to the negligence of the defendants the blocks upon which the keel of the plaintiffs' ship rested were uneven in height, whereby she suffered damage:—

Held, that although general words in a contract exempting the contractor from liability for damage caused by a breach of his contractual duty may be inoperative to excuse him where the duty is a prima facie absolute duty, such as that of a shipowner under a contract of affreightment to provide a seaworthy ship, it is otherwise where the contractor's obligation is only to exercise due care; that the prima facie duty of the defendants was not an absolute duty to provide blocks reasonably fit for the purpose for which they were to be used, but only a duty to take care that they were reasonably fit; and that the exemption clause, although expressed in general words, operated to exempt them from liability for the damage resulting from their unfitness. PYMAN STEAMSHIP COMPANY *v.* HULL AND BARNSLEY RAILWAY COMPANY
Bailhache J. 788

DUTY—Inland Revenue.
See under REVENUE.

"**DWELLING HOUSE**"—Undeveloped land duty — Land "developed by erection of dwelling-houses" - - - **627**
See REVENUE. 8.

EARNINGS—Workmen's compensation.
See under EMPLOYER AND WORKMAN.

ECCLESIASTICAL LAW—*Church Rate—Rate authorized by Local Act—In Consideration of the Abolition of Tithes—Good or Valuable Consideration—Rate partly for Ecclesiastical and partly for other Purposes—Compulsory Church Rate Abolition Act*, 1868 (31 *&* 32 *Vict. c.* 109), *ss.* 1, 2, 5, 10.

By a local Act, 6 Geo. 4, c. clxxvi., after reciting that it would be beneficial to the inhabitants of a parish in the city of London that an annual stipend should be paid to the rector of the parish in lieu and full satisfaction of all tithes or payments in lieu of tithes within the parish, it was provided in s. 1 that the churchwardens of the parish should pay to the rector for the time being a fixed annual sum in lieu, satisfaction, and discharge of all tithes or payments in lieu of tithes to which the rector was entitled within the parish. Sect. 7 abolished such tithes and payments in lieu of tithes; and s. 14 required the churchwardens and inhabitants in each year to make and sign a sufficient assessment, to be called "the church rate," upon the occupiers of lands and tenements within the parish for raising the said annual sum and such further sum as should be necessary for repairing and keeping in repair the parish church and churchyard, and for the payment of all necessary and proper

ECCLESIASTICAL LAW—*continued.*
salaries and disbursements relative to the parish church and churchyard, and the costs of collecting the rate.

By s. 1 of the Compulsory Church Rate Abolition Act, 1868, no proceedings shall be taken to enforce payment of any church rate made in any parish or place. By s. 2, where under a general or local Act a rate may be made and levied partly for ecclesiastical and partly for other purposes, such rate shall be made, levied, and applied for such last-mentioned purposes only. By s. 5, "This Act shall not affect any enactment in any private or local Act of Parliament under the authority of which church rates may be made or levied in lieu of, or in consideration of the extinguishment or of the appropriation to any other purpose of, any tithes, customary payments, or other property or charge upon property, which tithes, payments, property, or charge, previously to the passing of such Act, had been appropriated by law to ecclesiastical purposes as defined by this Act, or in consideration of the abolition of tithes in any place, or upon any contract made, or for good or valuable consideration given, and every such enactment shall continue in force in the same manner as if this Act had not passed." By s. 10, "In this Act 'ecclesiastical purposes' shall mean the building, rebuilding, enlargement, and repair of any church or chapel, and any purpose to which by common or ecclesiastical law a church rate is applicable, or any of such purposes"; and "'church rate' shall mean any rate for ecclesiastical purposes as hereinbefore defined":—

Held, that the "church rate" specified in s. 5 of the Act of 1868 was not limited to a church rate for ecclesiastical purposes as defined in s. 10, but meant the church rate as made or levied under the provisions of the private or local Act; that the church rate under the Act, 6 Geo. 4, c. clxxvi., which was a church rate not only for ecclesiastical purposes but also for other purposes, namely, the rector's stipend, was authorized to be made and levied "in consideration of the abolition of tithes"; and that therefore the whole rate was preserved from abolition by s. 5, and not merely that part of it which was applicable to payment of the rector's stipend. LONDON COUNTY COUNCIL *v.* ST. BOTOLPH, BISHOPSGATE, CHURCHWARDENS **C. A. 660**

EDUCATION—Maintenance and—Infant.
See under INFANT.

—— Rates—Exemption—County rate—Education expenses — Equalization charge
See RATES. 1. **603**

—— Schools.
See under SCHOOLS.

EDUCATION (ADMINISTRATIVE PROVISIONS) ACT, 1911, s. 3 - 803
See LONDON. 1.

EJUSDEM GENERIS—Workmen's compensation —"Concurrent contracts of service"—Rules of service - - - - - **53**
See EMPLOYER AND WORKMAN. 4.

ELECTION—Indictment—Joinder of counts for separate felonies—Discretion of judge to put prosecution to election or quash indictment - - - - - **720**
See CRIMINAL LAW. 4.

—— Workmen's compensation—Option - **61**
See EMPLOYER AND WORKMAN. 5.

ELEMENTARY SCHOOL.
See under SCHOOLS.

EMPLOYER AND WORKMAN—*Compensation —Arising "out of and in the course of" the Employment—Brewers' Drayman—Injury by Accident—Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A brewers' drayman, whose duty it was from 8 in the morning till 8 in the evening to drive round a certain district in London a pair of horses in a dray belonging to his employers for the purpose of obtaining orders for and delivering beer to their customers, at about 2 o'clock in the afternoon left his dray at the side of the road opposite to a public house, to which he went to get a glass of beer. After an absence of about two minutes he left the public-house to return to his dray, and while crossing the road was knocked down by a motor car, receiving injuries which resulted in his death. Upon a claim by his dependants for compensation under the Workmen's Compensation Act, 1906:—

Held, that there was no break in the employment; that what the man did was reasonably incident to his employment: that he was exceptionally exposed to street accidents; that the accident therefore arose out of and in the course of the employment; and that the dependants were consequently entitled to compensation. MARTIN *v.* J. LOVIBOND & SONS, LIMITED - - - - - - - **C. A. 227**

2. —— *Compensation—Basis of Calculation— "Average weekly earnings"—Casual Labourer —Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (1—3).

A docker employed in casual labour as a grain porter by the respondents was incapacitated by injury from an accident arising out of and in the course of his employment. In an arbitration under the Workmen's Compensation Act, 1906, the county court judge found that the average weekly earnings during the twelve months previous to the accident of a man in the same grade employed at the same work as the applicant were 25*s.*, and he awarded him compensation at the rate of 12*s.* 6*d.* a week. It was proved that the applicant was exceptionally good at his work and was able to earn the highest wages of such men in the port of Bristol; and that during the twelve months preceding the accident he had earned wages at the rate of 2*l.* a week, but not in the employment of the same employer:—

Held, on appeal, that the proper method of assessing the weekly payment in such a case was not to ascertain the amount of the average weekly earnings of men employed in the same class of work as the applicant and to award him 50 per cent. of that amount. The arbitrator must have regard to the personal qualifications of the individual workman, whether he was

EMPLOYER AND WORKMAN—*continued.*

above or below the average, and if his actual earnings during the past year, or any other evidence, shewed that he was in fact above the average, that must be regarded. SNELL *v.* MAYOR, &C., OF BRISTOL - - - **C. A. 291**

3. —— *Compensation—Company—Accident Fund—Scheme—Construction—Dependant—Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *s.* 3—*Committee of Accident Fund—Decision final—Appeal to Court of Appeal—Jurisdiction.*

Under a scheme formed by the defendant company pursuant to s. 3 of the Workmen's Compensation Act, 1906, and managed by an accident committee, certain allowances were to be made "in case of the death of a member through an injury arising out of and in the course of his duties in the company's service." The scheme (inter alia) provided that "any question with regard to what is an injury within the meaning of that term as used in the scheme, as to who are dependants, as to which dependants are entitled to receive payments due from the fund, and the amount or amounts of such payments, shall be determined by the committee." And further, that "if any question (other than such as the committee, or the board of directors, are hereby expressly empowered to decide) shall arise with respect to the scheme . . . . or with respect to the construction or meaning of the scheme, or the rules framed in connection therewith, or any variation or alteration thereof respectively, such question shall be settled by the committee, whose decision shall be final and conclusive."

A workman in the employment of the company, who had become a party to the scheme, met with an accident in the goods depot of the company, and died from his injuries. His widow claimed compensation under the scheme as a dependant, but the committee declined to admit the claim without giving any reasons for their decision. In an action by the widow against the company and the accident committee claiming a declaration that the death of her husband was caused by an injury arising out of and in the course of his duties in the defendant company's service, and 195*l.* compensation :—

Held, that having regard to the whole scheme, which was intended to be in substitution for the rights of workmen under the Workmen's Compensation Act, 1906, the committee had power to determine all claims arising under the scheme, and such determination was final.

Held, also, that the plaintiff, having failed to obtain an allowance of her claim by the committee, could not sustain the action.

Haworth v. *Andrew Knowles & Sons* (1903) 19 Times L. R. 658 distinguished. ALLEN *v.* GREAT EASTERN RAILWAY COMPANY **C. A. 243**

4. —— *Compensation—"Concurrent contracts of service"—Ejusdem generis—Rules of Service—Workmen to "devote themselves exclusively to the company's service"—"Average weekly earnings"—Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., par.* 2 (*b*)—*Railway Company—Platelayer.*

A platelayer in the service of a railway company, whose wages were 21*s.* a week, and his working hours from 6 A.M. to 5.30 P.M., and noon on Saturdays, also worked at a theatre from 7 P.M. to 10.30 P.M. at 7*s.* a week. He met with an accident on the railway and applied for compensation from the railway company under the Workmen's Compensation Act, 1906, claiming 14*s.* a week on the footing that he was entitled to have his earnings at the theatre taken into consideration as well as those in the service of the company. The company contended that his contract of service with them was governed by "Rules and Regulations for the guidance of the officers and men" in their service, printed in a small book which the applicant admitted he had received, but of which he said he did not know the effect. By rule 1 "all persons employed by the company must devote themselves exclusively to the company's service." . . . . By rule 11 "No servant of the company is allowed to trade" . . . . and by rule 243 inspectors were to keep registers of the names and addresses of all employees so that they might be able in case of accident to summon them immediately :—

Held that, assuming that rule 1 formed part of the contract of service, it meant that all persons employed by the company must, whilst they were doing the company's work, devote themselves exclusively to the company's service; that the company could not interfere with their workmen in the hours when they were not actually doing their work; that workmen were not bound under rule 243 to hold themselves at all times in readiness for emergencies; that there were concurrent contracts of service and there was nothing in the Act to shew that such contracts must be ejusdem generis. LLOYD *v.* MIDLAND RAILWAY COMPANY **C. A. 53**

5. ——*Compensation—Death of Workman—Claim by Children—Payment of Compensation—Action by Widow for Negligence—Option—Election—Fatal Accidents Act,* 1846 (9 & 10 *Vict. c.* 93)—*Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 2 (*b*).

Sect. 1, sub-s. 1, of the Workmen's Compensation Act, 1906, enacts that if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as therein mentioned, be liable to pay compensation. Sub-s. 2 provides that when the injury was caused by the personal negligence or wilful act of the employer or some person for whose act or default the employer is responsible, nothing in the Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under the Act or take proceedings independently of the Act; but that the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under the Act, and shall not be liable to any

EMPLOYER AND WORKMAN—*continued.*

proceedings independently of the Act, except in case of such personal negligence or wilful act as aforesaid.

By s. 13 any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants including members of his family wholly or in part dependent on his earnings :—

Held, that the effect of these enactments is : (1.) That where a workman has been injured by accident in circumstances which would give him, or, in the event of his death, his dependants, a claim for compensation under the Act and also for damages for negligence independently of the Act, the workman or his dependants, as the case may be, can pursue either remedy but not both remedies. The claimant has an option as to which he will choose, and, having elected either alternative, is bound by his election.

(2.) That the employer is not to be liable to pay compensation for injury to a workman or his dependants both independently of and also under the Act.

The plaintiff, who was the widow of a workman killed by accident arising out of and in the course of his employment, brought an action under the Fatal Accidents Act, 1846, against the defendants, who had been his employers, charging them with negligence causing her husband's death. The statement of claim alleged that the deceased workman left as dependants the plaintiff and six children ; that all the dependants except the plaintiff had claimed under the Workmen's Compensation Act, 1906, against the defendants, and that an award had been made apportioning the total sum of 300*l.* equally between the children. The defendants by their defence, after denying the alleged negligence, pleaded that the plaintiff had made a claim on them on behalf of herself and her children for compensation under the Act of 1906 ; that the defendants admitting liability under that Act had paid into the county court the maximum amount payable under the Act, namely, 300*l.* ; that the children by their next friend had applied to the county court for an order for the investment and allotment of the sum of 300*l.* between the dependants, and that the county court judge had allotted 50*l.* to each of the children and directed that 45*l.* out of each sum of 50*l.* should be invested, and that out of the residue the sum of 18 shillings a week together with the interest on the invested money should be paid to the plaintiff for the benefit of the children ; that the plaintiff knew the facts and concurred in the application and attended the hearing and thereat renounced her rights and interest in the sum of 300*l.*, and that the award and allotment were made with her consent. It appeared that in the application for allotment the children by their next friend named the plaintiff as a dependant, but applied for a division among the children only and expressly stated that the plaintiff did not claim under the Act of 1906.

An order having been made in chambers for the decision of the point of law raised on the pleadings, the Court declined to hold as a matter of law that the plaintiff had elected to pursue her remedy under the Act of 1906, the question of election being principally one of fact ; but

Held, that the defendants having paid compensation under the Act of 1906 were not liable to pay damages under the Act of 1846. CODLING *v.* JOHN MOWLEM AND COMPANY, LIMITED - - - - - **Atkin J. 61**

EMPLOYER AND WORKMAN—*continued.*

6. —— *Compensation—Industrial Disease—Gradual Process — Nature of Employment — Burden of Proof—Last Employer—Third Party —Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 8.

By s. 8, sub-s. 1, of the Workmen's Compensation Act, 1906, where the death of a workman is caused by an industrial disease "and the disease is due to the nature of any employment in which the workman was employed at any time within the twelve months previous to the date of the disablement or suspension, whether under one or more employers, he or his dependants shall be entitled to compensation under this Act as if the disease or such suspension as aforesaid were a personal injury by accident arising out of and in the course of that employment . . . . (*c*) The compensation shall be recoverable from the employer who last employed the workman during the said twelve months in the employment to the nature of which the disease was due : Provided that— . . . . (ii.) if that employer alleges that the disease was in fact contracted whilst the workman was in the employment of some other employer" he may join him as a party to the arbitration and (iii.) "if the disease is of such a nature as to be contracted by a gradual process, any other employers who during the said twelve months employed the workman in the employment to the nature of which the disease was due" shall be liable to contribute ; and by sub-s. 2, "if the workman at or immediately before the date of the disablement or suspension was employed in any process mentioned in the second column of the Third Schedule to this Act, and the disease contracted is the disease in the first column of that schedule set opposite the description of the process, the disease, except where the certifying surgeon certifies that in his opinion the disease was not due to the nature of the employment, shall be deemed to have been due to the nature of that employment, unless the employer proves the contrary."

A workman had worked for W. for several years as a lead worker and had contracted lead poisoning, but had not worked for him within twelve months of his disablement. He worked for R. in a lead process for nine days within twelve months of but not "at or immediately before" his disablement as provided in sub-s. 2. He died of lead poisoning, and his widow applied for compensation :—

Held that, the death not coming within sub-s. 2, there was no presumption that the disease was caused by the last employment ; it was not enough for the applicant to prove that her husband had been employed in a lead process within twelve months and that he died of lead poisoning ; it must be shewn that the disease

EMPLOYER AND WORKMAN—*continued.*

was caused by the last employment; and, on the facts, that the disease had not been contracted in the last employment, and no case had been made against third parties. DEAN *v.* RUBIAN ART POTTERY, LIMITED - - **C. A. 213**

7. —— *Compensation—Infant Workman—Weekly Payments—Application to review—Probable Earnings—Date of Computation—Retrospective Award—Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (16.).

Upon an application, under Sched. I. (16.) of the Workmen's Compensation Act, 1906, to review the weekly payment payable to a workman who was, at the date of the accident whereby he was injured, under twenty-one years of age, the arbitrator cannot properly award an increase of the weekly payment as from a date antecedent to the date of the application to review. WILLIAMS *v.* BWLLFA AND MERTHYR DARE STEAM COLLIERIES (1891), LIMITED **C. A. 30**

8. —— *Compensation—Recording Memorandum of Agreement — Notice to "parties interested" — Notice sent to Approved Society—Appearance before County Court Judge—Objection to Locus Standi—Order of County Court Judge—Rules of Court—Ultra vires—Appeal—Court of Appeal or Divisional Court—Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *Sched. II., pars.* 4, 9, 12—*National Insurance Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 55), *s.* 11—*Consolidated Workmen's Compensation Rules, July,* 1913, *r.* 44 (3.).

By paragraph 4 of Sched. II. to the Workmen's Compensation Act, 1906, "The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but a committee or an arbitrator may, if they or he think fit, submit any question of law for the decision of the judge of the county court, and the decision of the judge on any question of law, either on such submission, or in any case where he himself settles the matter under this Act, or where he gives any decision or makes any order under this Act, shall be final, unless within the time and in accordance with the conditions prescribed by Rules of the Supreme Court either party appeals to the Court of Appeal; and the judge of the county court, or the arbitrator appointed by him, shall, for the purpose of proceedings under this Act, have the same powers of procuring the attendance of witnesses and the production of documents as if the proceedings were an action in the county court."

By paragraph 9 of the same schedule, "Where the amount of compensation under this Act has been ascertained, or any weekly payment varied, or any other matter decided under this Act, either by a committee or by an arbitrator or by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of Court, by the committee or arbitrator, or by any party interested, to the registrar of the county court who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a county court judgment.

"Provided that—

"(*a*) no such memorandum shall be recorded before seven days after the despatch by the registrar of notice to the parties interested; . . . .

"(*d*) where it appears to the registrar of the county court, on any information which he considers sufficient, that an agreement as to the redemption of a weekly payment by a lump sum, or an agreement as to the amount of compensation payable to a person under any legal disability, or to dependants, ought not to be registered by reason of the inadequacy of the sum or amount, or by reason of the agreement having been obtained by fraud or undue influence, or other improper means, he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the judge, who shall, in accordance with rules of Court, make such order (including an order as to any sum already paid under the agreement) as under the circumstances he may think just; . . . ."

By r. 44 (3.) of the Consolidated Workmen's Compensation Rules, July, 1913, "Where an agreement is made as to the amount of compensation payable in the form of a weekly payment or of a lump sum to a workman who is an insured person within the meaning of the National Insurance Act, 1911, or as to the redemption by a lump sum of a weekly payment to a workman who is such an insured person, the Insurance Commissioners, or the society or committee concerned in the administration of any benefit to which such insured person is entitled under the last-mentioned Act, shall for the purposes of paragraph 9 of the Second Schedule to the Act, and of these rules, be deemed to be parties interested."

Held, that an order made by a county court judge on an application to record a memorandum of agreement, which has been refused by the registrar and referred by him to the judge under paragraph 9 (*d*) of Sched. II., is an order made by him as arbitrator, from which an appeal lies to the Court of Appeal under paragraph 4.

Held, also, that an approved society is not a "party interested" within the meaning of paragraph 9 of Sched. II., and that r. 44 (3.) so far as it purports to declare that it is to be so deemed is ultra vires. BONNEY *v.* JOSHUA HOYLE & SONS, LIMITED - - **C. A. 257**

9. —— *Compensation — Sailor — Return to Ship—Ashore to buy Provisions—Agreement by Crew to find their own Provisions—Ship's Business—Statutory Agreement — Accident arising out of Employment—Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A fireman on board the steamship *Black Rock* went ashore, with leave, to buy provisions. When he endeavoured to return to the ship she had been moved and the night was rough and dark; he fell into the sea and was drowned. His widow claimed compensation under the Workmen's Compensation Act, 1906, from the owners of the ship on the ground that at the time of the accident the deceased was fulfilling a con-

EMPLOYER AND WORKMAN—*continued.*
tractual obligation and was employed on ship's business. His contract of service was contained in a document issued by the Board of Trade under ss. 114 and 116 of the Merchant Shipping Act, 1894. Particulars of the ship and her owners were given, and an agreement by the persons whose names were subscribed to serve on board the ship in their respective capacities; and (in the printed form) the master agreed to pay them their respective wages and to "supply them with provisions according to the scale printed on p. 15 of this book." The words as to supplying provisions were struck out in this case, and across p. 15 the words "crew to provide their own provisions" had been written:—

Held (Sir Samuel Evans, President, dissenting), that there was no contractual obligation on the deceased to supply his own provisions; that in going ashore to order provisions he was acting for his own purposes, and not on ship's business; and that his widow was not entitled to compensation. PARKER *v.* OWNERS OF SHIP BLACK ROCK - - - - - - C. A. 39

10. —— *Compensation—Weekly Payments—Review—Application by Employer—Diminution and/or Redemption—Withdrawal of Application as to Redemption—Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *Sched. I.* (16.), (17.).

Where an employer applied, under the Workmen's Compensation Act, 1906, for a review in respect of the diminution, or redemption, or both, of a weekly payment which had been awarded to a workman injured by accident while in his employ:—

Held, that he was entitled to withdraw the application as to redemption and proceed upon it as to diminution.

Calico Printers Association v. *Booth* [1913] 3 K. B. 652 explained. GOTOBED *v.* PETCHELL C. A. 36

EQUITABLE EXECUTION — Practice—Execution—Receiver, Appointment of - 183
See EXECUTION.

ESTOPPEL—Banker—Deposit of securities by broker—Authority of broker to pledge—Purchase for value in good faith 168
See BANKER.

EVIDENCE— Agricultural holdings — Arbitration — Rejection of evidence by arbitrator — "Misconduct" — Competency of appeal to Divisional Court
See LANDLORD AND TENANT. 1. 478

—— County court—Action tried with jury—Verdict and judgment for plaintiff—Application for new trial on ground of no evidence—Power of county court judge to grant new trial - - 448
See COUNTY COURT. 1.

EXCISE LICENCE—Licensing Acts—Refusal of retail excise licence—Statutory duty of Commissioners - - - - - 390
See LICENSING ACTS. 3.

EXECUTION — *Receiver, Appointment of — Equitable Execution—Practice—Supreme Court of Judicature Act*, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.

The Court has no jurisdiction to appoint a receiver by way of equitable execution (so called) in aid of a judgment at law except in cases in which execution cannot be levied in the ordinary way, by reason of the nature of the property, and in which the Court of Chancery before the Judicature Act would have had jurisdiction to make the order.

Harris v. *Beauchamp Brothers* [1894] 1 Q. B. 801 followed.

Decision of Scrutton J. reversed. MORGAN *v.* HART - - - - - - - C. A. 183

—— Bankruptcy—Judgment debtor—Execution levied — Payment not direct to judgment creditor—Withdrawal of sheriff —"Completion of execution" - 70
See BANKRUPTCY. 5.

—— Surrender of tenancy—Tenant remaining in possession—Claim by landlord for rent - - - - - - - 469
See LANDLORD AND TENANT. 6.

EXECUTOR—Lease—Death of assignee intestate —Executor de son tort — Personal liability on repairing covenant - 562
See LANDLORD AND TENANT. 3.

"EXPENSES"—Order to pay—Appeal from referee—Unascertained amount—Rule of Court - - - - - - 842
See REVENUE. 5.

FATAL ACCIDENT—Workmen's compensation —Death of workman—Claim by children — Payment of compensation — Action by widow for negligence — Option—Election - - - 61
See EMPLOYER AND WORKMAN. 5.

FELONY—Criminal law—Attempted suicide—Whether punishable with hard labour— "Attempt to commit felony" - 107
See CRIMINAL LAW. 1.

—— Indictment—Joinder of counts for separate felonies—Discretion of judge to put prosecution to election or quash indictment - - - - - - - 720
See CRIMINAL LAW. 4.

FENCE—Dangerous premises—House let out in separate floors — Flight of steps in possession of landlord—Steps insufficiently fenced—Liability - - 318
See NEGLIGENCE.

—— Insufficiency of fence — Land adjoining street—Use of land for purposes causing inconvenience or annoyance to the public—Jurisdiction of justices - 85
See LOCAL GOVERNMENT. 2.

FINANCE ACTS.
See under REVENUE.

FIRE INSURANCE.
See under INSURANCE (FIRE).

FIRES PREVENTION (METROPOLIS) ACT, 1744, s. 83 - - - - - **545**
See INTERPLEADER.

FOREIGN POSSESSIONS—Income tax—Property settled on infants—Maintenance and education - - - - **643**
See REVENUE. 2.

FORGERY—Obtaining money by forged instrument—Letter asking for money—"Instrument" - - - - **209**
See CRIMINAL LAW. 3.

FRAUD — Contract — Rescission — Concealed fraud—Statute of Limitation - **139**
See LIMITATION, STATUTE OF.

FRAUDULENT CONVEYANCE—Bankruptcy—Insolvent traders—Transfer of business to private company — Shares and debentures — Bona fides — Approval of majority of creditors — Defeating or delaying creditors—Act of bankruptcy
See BANKRUPTCY. 4. **694**

GAMING — *Betting House — Using a House — Persons resorting thereto — Betting Act*, 1853 (16 *&* 17 *Vict. c.* 119), *s.* 1.

By s. 1 of the Betting Act, 1853, no house shall be used for the purpose of the owner thereof, or any person using the same, or any person employed by such owner or person using the same, betting with persons resorting thereto. By s. 3 any person who, being the owner of any house or a person using the same, uses the same for the purpose aforesaid is liable to a penalty.

The appellant used a house in the following way:—He employed two servants to stand respectively one inside the house and the other outside, both close to the doorway, which was kept open. Persons passing along the street handed betting slips to the man outside, who, without moving from his position, handed them to the man inside, who subsequently sent them to the appellant at another address. The slips related to bets on horse races:—

Held, that there was evidence on which the appellant could properly be convicted of using the house for the purpose of betting with persons resorting thereto. TAYLOR *v.* MONK
Div. Ct. 817

GATESHEAD IMPROVEMENT ACT, 1867, s. 32
See REVENUE. 1. **883**

GULLY — London—Sanitary authority—Highway—Sewer—Defective gully - **89**
See LONDON. 2.

HARD LABOUR—Whether punishable with—Attempted suicide—"Attempt to commit felony" - - - - **107**
See CRIMINAL LAW. 1.

HARD LABOUR ACT, 1822 - - - **107**
See CRIMINAL LAW. 1.

HEALTH INSURANCE.
See under INSURANCE (HEALTH).

HIGHWAY — London — Sanitary authority — Sewer—Defective gully—Negligence—Nonfeasance — Misfeasance — Local government - - - - - **89**
See LONDON. 2.

HIRE-PURCHASE — Distress — Rent — Exemptions—Goods of stranger—"Goods comprised in hire-purchase agreement" **132**
See DISTRESS.

HUSBAND AND WIFE—Judgment—Amendment — Accidental slip — Judgment wrongly entered against married woman - - - - - **734**
See JUDGMENT.

INCOME TAX.
See under REVENUE.

INDICTMENT—Criminal law.
See under CRIMINAL LAW.

—— Pleading — Duplicity — Objection—Appeal —"No substantial miscarriage of justice" - - - - - **99**
See CRIMINAL LAW. 7.

—— Prostitution, Living on earnings of—Jurisdiction of quarter sessions to try - **386**
See CRIMINAL LAW. 5.

INDUSTRIAL DISEASE — Workmen's compensation - - - - - **213**
See EMPLOYER AND WORKMAN. 6.

INDUSTRIAL SCHOOL—Power to send to—Child—Prosecution of - - - **494**
See INFANT.

INFANT—*Child—Prosecution of—Offence not punishable in Case of Adult with Penal Servitude—Power to send to Industrial School—Children Act*, 1908 (8 *Edw.* 7, *c.* 67), *s.* 58, *sub-s.* 3.

Under s. 58, sub-s. 3, of the Children Act, 1908, justices have jurisdiction to order a child to be sent to a certified industrial school, as well where he has been guilty of an offence the maximum punishment of which would in the case of an adult be less than penal servitude, as where he has been guilty of an offence which in the case of an adult would be punishable with penal servitude. TYDEMAN *v.* THROWER
Div. Ct. 494

—— Criminal law — Child — Conviction for larceny — Sentence — Power to order child to be whipped—Officer to administer whipping - - - **378**
See CRIMINAL LAW. 2.

—— Income tax — Foreign possessions — Property settled on infants—Maintenance and education - - - **643**
See REVENUE. 2.

—— Workmen's compensation—Infant workman—Weekly payments—Application to review—Retrospective award - **30**
See EMPLOYER AND WORKMAN. 7.

INFRINGEMENT—By-laws—Local government — Buildings — Part of old building pulled down and new part erected—"New building"—Plans of whole building - - - - - - - 798
See BUILDINGS.

INHABITED HOUSE DUTY.
See under REVENUE.

INSOLVENT TRADERS — Bankruptcy—Transfer of business to private company—Shares and debentures—Bona fides—Approval of majority of creditors—Defeating or delaying creditors—Fraudulent conveyance—Act of bankruptcy - - - - - - - 694
See BANKRUPTCY. 4.

"**INSTRUMENT**"—Forgery—Obtaining money by forged instrument—Letter asking for money - - - - - - 209
See CRIMINAL LAW. 3.

INSURANCE (FIRE)—Interpleader—Insurance on house against fire—Insurance in names of lessor and lessee—"Adverse claims" - - - - - - 545
See INTERPLEADER.

INSURANCE (HEALTH)—*Sickness Benefit—Rule of Approved Society requiring "medical certificate or other sufficient evidence of incapacity and the cause thereof"—Right to Sickness Benefit dependent upon Incapacity for Work "by some specific disease or by bodily or mental disablement"—Medical Certificate that Member suffering from "Debility"—Sufficiency of Certificate—Dispute between Member and Society—National Insurance Act*, 1911 (1 *&* 2 *Geo.* 5, *c.* 55), *ss.* 8, 14, 67.

The rules of an approved society under the National Insurance Act, 1911, provided, with regard to sickness and disablement benefits, that "an illness shall not be deemed to commence or continue unless the member is rendered incapable of work by some specific disease or by bodily or mental disablement," and that "an insured member shall send notice of illness to the local secretary of the society . . . . and shall not be entitled to sickness benefit until he has sent to the local secretary . . . . a medical certificate or other sufficient evidence of incapacity and the cause thereof." A further rule provided that disputes arising between an insured member and the society should be decided by the general delegates' meeting.

The plaintiff, a member of the society, sent in a claim for sickness benefit accompanied by a medical certificate which stated that she was "suffering from debility and unable to work." The society requested that the certificate should be amended by the cause of the debility being stated, and as this request was not complied with the society refused to pay the plaintiff sickness benefit. The plaintiff thereupon sued the society, claiming, first, an injunction to restrain them from refusing to accept and consider as evidence of her claim to sickness benefit the medical certificate she had sent, and, secondly, a sum in respect of sickness benefit:—

Held, that the Court had no jurisdiction to entertain the action inasmuch as the matter was a dispute within s. 67 of the National Insurance Act, 1911, and must be decided by the tribunal set up by the society's rules.

Heard v. *Pickthorne* [1913] 3 K. B. 299 distinguished.

BAILEY *v.* INSURANCE SECTION OF THE CO-OPERATIVE WHOLESALE SOCIETY, LIMITED **Div. Ct. 233**

INSURANCE (LIFE) — Bankruptcy — After-acquired property — Premiums paid—Duty of trustee - - - - - 689
See BANKRUPTCY. 1.

INSURANCE (MARINE)—*Passage Money—Disbursements — Loss — Subsequent Earning of other Passage Money—Salvage.*

The plaintiffs, the owners of a ship, effected an insurance by a Lloyd's policy on passage money of a specified amount plus 50 per cent. to Australia and New Zealand "against Passenger Act . . . . to cover any disbursements that may be made by the assured arising from accident or loss on account of passengers for conveyance to intended destination." The ship, after starting on the voyage with a number of emigrant passengers on board who had paid the passage money referred to in the policy, met with an accident, and in consequence the passengers were transferred to other ships, in accordance with the provisions of the Merchant Shipping Act, 1894, in which they were conveyed at the plaintiffs' expense to their destination. The plaintiffs' ship was repaired and subsequently proceeded on the voyage with a fresh lot of passengers on board. The plaintiffs claimed to recover as a loss under the policy the money paid by them for the conveyance of the passengers on the other ships:—

Held, that the policy was an insurance of disbursements which might be made in respect of the passengers whose passage money was referred to in the policy; that the passage money paid by the second lot of passengers could not be treated as salvage; and that the plaintiffs were entitled to recover the sum claimed as a loss under the policy. NEW ZEALAND SHIPPING COMPANY, LIMITED *v.* DUKE - - - - - - **Pickford J. 682**

—— Practice—Parties—Joinder of defendants—Separate causes of action — Policy underwritten by defendants for separate amounts - - - - 747
See PRACTICE. 4.

INSURANCE (NATIONAL) — County court—Point of law not raised in county court—Point going to jurisdiction of the Court - - - - - - 352
See COUNTY COURT. 2.

—— Dispute between member and society—Medical certificate that member suffering from "debility"—Sufficiency of certificate - - - - - 233
See INSURANCE (HEALTH).

INSURANCE (NATIONAL)—*continued.*

—— Workmen's compensation—Appeal—Court of Appeal or Divisional Court - **257**
See EMPLOYER AND WORKMAN. 8.

INTEREST—Money-lender — Excessive interest —Questions of law or of fact - **372**
See MONEY-LENDER. 2.

INTERPLEADER—*Insurance on House against Fire—Insurance in Names of Lessor and Lessee—House destroyed by Fire — Lessor requiring Insurance Company to rebuild—Lessee claiming Payment of Insurance Money — "Adverse claims" — "Debt, money, goods, or chattels"—Practice — Fires Prevention (Metropolis) Act,* 1774 (14 *Geo.* 3, *c.* 78), *s.* 83—*Rules of the Supreme Court*, 1883, *Order LVII.*, *r.* 1 (*a*).

A house was insured against fire in the joint names of the lessor and lessee. During the currency of the policy the house was burnt down, and the lessor served notice on the insurance company under s. 83 of the Fires Prevention (Metropolis) Act, 1774, requesting them to cause the insurance money to be laid out and expended in or towards rebuilding the house. The lessee wrote a letter to the insurance company which the latter contended amounted to a claim that the insurance money should be paid to him. The insurance company took out an originating summons for relief by way of interpleader under Order LVII., r. 1 (*a*):—

Held, that the insurance company were not entitled to relief by way of interpleader.

By Vaughan Williams L.J., upon the ground that the lessee had not made any claim to the insurance money, and that therefore there were not "two or more parties making adverse claims" within Order LVII., r. 1 (*a*).

By Buckley and Kennedy LJJ., upon the ground that as the lessor was claiming the performance by the insurance company of their statutory obligation under s. 83 of the Act of 1774 to expend the insurance money in rebuilding the house, and as the lessee was claiming that the insurance company should pay the money to him, there were not two or more parties making "adverse claims" in respect of a liability of the insurance company "for any debt, money, goods, or chattels" within Order LVII., r. 1 (*a*). SUN INSURANCE OFFICE *v.* GALINSKY - - - - - **C. A. 545**

JOINDER—Indictment—Joinder of counts for separate felonies—Discretion of judge to put prosecution to election or quash indictment - - - - - **720**
See CRIMINAL LAW. 4.

—— Parties—Joinder of defendants—Separate causes of action—Policy underwritten by defendants for separate amounts
See PRACTICE. 4. **747**

JUDGMENT — *Amendment — Accidental Slip—Practice — Judgment wrongly entered against Married Woman—Rules of the Supreme Court, Order XXVIII.*, *r.* 11.

By Order XXVIII., r. 11, "clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a judge on motion or summons without an appeal."

JUDGMENT—*continued.*

The plaintiffs signed judgment in default of appearance against the defendant, a married woman sued in respect of her separate estate. By mistake the judgment was drawn up in the ordinary form of a personal judgment against the defendant instead of in the appropriate form laid down by the Court of Appeal in *Scott* v. *Morley* (1887) 20 Q. B. D. 120. The plaintiffs having taken out a summons for leave to amend the judgment so as to follow the form of judgment prescribed in the case of a judgment against a married woman upon a contract made during coverture, a Master and a judge at chambers declined to make any order upon it:—

Held by Vaughan Williams L.J. and Buckley L.J. (Kennedy L.J. dissenting), that the plaintiffs were proposing not to make a correction in the judgment but to substitute one form of judgment for another, and that Order XXVIII., r. 11, had no application to the case.

Held by Kennedy L.J., that the case fell within Order XXVIII., r. 11, but that the Master and judge had under the circumstances rightly exercised their discretion in refusing to make the amendment. OXLEY *v.* LINK - **C. A. 734**

—— Bankruptcy — Judgment debtor —Execution levied—Payment out direct to judgment creditor — Withdrawal of sheriff—"Completion of execution" **70**
See BANKRUPTCY. 5.

—— Jury action — Disagreement of jury — Application for judgment — Appeal—Power to enter judgment - - **429**
See PRACTICE. 2.

JUDICATURE (SUPREME COURT OF) ACT, 1873, s. 25, sub-s. 8 - - - **188**
See EXECUTION.

JURISDICTION—Appeal from county court—Non-appearance of respondent—Motion to reinstate — Jurisdiction of High Court - - - - - - **421**
See PRACTICE. 1.

—— Justices.
See under JUSTICES.

—— Licensing Acts.
See under LICENSING ACTS.

—— Seaman—Discharge—Dispute—Submission to deputy superintendent of a mercantile marine office - - **455**
See SHIPPING.

—— Service out of the jurisdiction—Parties—Joinder of defendants - - - **747**
See PRACTICE. 4.

—— Workmen's compensation—Appeal - **243**
See EMPLOYER AND WORKMAN. 3.

JURY—Action tried with jury—Verdict and judgment for plaintiff—Application for new trial on ground of no evidence—Power of county court judge to grant new trial - - - - - **448**
See COUNTY COURT. 1.

JURY—*continued.*

—— Disagreement of jury—Application for judgment—Appeal—Power to enter judgment—Jury action - - **429**
See PRACTICE. 2.

JUSTICES—Betting.
See under GAMING.

—— Building notice—New buildings—Public elementary school—Alterations - **803**
See LONDON. 1.

—— Buildings—By-laws—Infringement - **798**
See BUILDINGS.

—— Child—Prosecution of—Power to send to industrial school - - - - **494**
See INFANT.

—— Corporation—By-law—Wilful obstruction of corporation's servants in execution of their duty—Motor omnibus - **762**
See CORPORATION.

—— Criminal law.
See under CRIMINAL LAW.

—— Licensing Acts.
See under LICENSING ACTS.

—— Local government—Land adjoining street—Insufficiency of fence—Use of land for purposes causing inconvenience or annoyance to the public—Jurisdiction of justices - - - - - - **85**
See LOCAL GOVERNMENT. 2.

—— Lotteries—Prize competition—Exercise of skill - - - - - - - **868**
See LOTTERY.

—— Rates.
See under RATES.

—— Shops.
See under SHOPS.

LAND—Land adjoining street—Insufficiency of fence—Use of land for purposes causing inconvenience or annoyance to the public—Jurisdiction of justices - **85**
See LOCAL GOVERNMENT. 2.

—— Revenue—Income tax—Profits of trade—"Fair and just average"—Deductions—Land owned by trader - - **21**
See REVENUE. 3.

—— Revenue—Land values—Provisional valuation—Appeal from referee - - **842**
See REVENUE. 5.

—— Revenue — Undeveloped land duty — "Dwelling-house" - - - **627**
See REVENUE. 8.

—— Revenue—Undeveloped land duty—Person chargeable - - - - - - **327**
See REVENUE. 9.

LANDLORD AND TENANT — *Agricultural Holding—Claims by Landlord and Tenant—Arbitration—Rejection of Evidence by Arbitrator—Application to County Court to set Award aside on Ground of "Misconduct"—Competency of Appeal to Divisional Court—Agricultural Holdings Act*, 1908 (8 *Edw.* 7, *c.* 28), *ss.* 13, 30, 43; *Sched. II.*

LANDLORD AND TENANT—*continued.*

An appeal lies to the Divisional Court under s. 120 of the County Courts Act, 1888, from the decision upon any question of law of a county court judge in hearing an application to set aside an award under the Agricultural Holdings Act, 1908.

Rejection of evidence by an arbitrator may constitute "misconduct" on his part entitling the party aggrieved to have the award set aside. WILLIAMS *v.* WALLIS AND COX - **Div. Ct. 478**

2. —— "*Assessments charged on the premises*" — *Inhabited House Duty — Landlord assessed by Mistake—Payment by Landlord—Implied Request—Lease—Covenant by Lessee.*

A lessee under a lease covenanted to pay all assessments charged upon the demised premises :—

Held, that inhabited house duty was charged upon the premises within the meaning of the covenant.

Before the making of the lease the lessor was assessed to landlord's property tax and to inhabited house duty, the demands in respect of both the tax and the duty being by her directions sent to her bankers and paid by them. After the making of the lease the same course was pursued; the lessor continued to be assessed to inhabited house duty; she did not appeal against the assessment, and the duty continued to be paid by her bankers on her account :—

Held, that the lessor not having appealed was bound by the assessment and liable to pay the duty, and that, having paid it, she was entitled to recover from the lessee the amount paid as upon an implied request by the lessee to pay the duty and an implied promise by the lessee to refund the amount paid. EASTWOOD *v.* MCNAB - - - - - **Div. Ct. 361**

3. —— *Lease—Repairing Covenant—Death of Assignee intestate—Executor de son tort—Personal Liability on Repairing Covenant.*

The assignee of a lease granted by the plaintiffs died intestate leaving no estate other than the lease. The defendant, her son, who had collected the rents of the demised premises on his mother's behalf during her lifetime, continued to collect them after her death, and, after paying the ground rent in her name to the plaintiffs, he handed the balance to his sister. After his sister's death the defendant still continued to collect the rents and to pay the ground rent in his mother's name to the plaintiffs, retaining the surplus for such person or persons as might in law be found entitled thereto. Shortly after the defendant's sister's death the plaintiffs became aware for the first time of the death of the defendant's mother, the assignee of the lease, and after some correspondence with the defendant they entered into possession of the premises and sought to make him personally liable for breach of the repairing covenant contained in the lease on the ground that he had

LANDLORD AND TENANT—*continued.*

intermeddled with the lease and had become an executor de son tort :—

Held, that the defendant was not liable by privity of estate as the lease was never vested in him, and he had not so acted as to make himself liable by estoppel.

The decision in *Williams* v. *Heales* (1874) L. R. 9 C. P. 177 was founded upon estoppel. STRATFORD-UPON-AVON CORPORATION *v.* PARKER - - - - - **Div. Ct. 562**

4. —— *Notice—Covenant to Repair—Notice of Breach—Specification of particular Breach complained of—Addition of General Clause—Sufficiency of Notice—Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 14, *sub-s.* 1.

A notice was served under s. 14 of the Conveyancing and Law of Property Act, 1881, by the lessor of six small houses on the lessee stating that the repairing covenants in the lease had been broken and that the particular breaches which were complained of were the committing or allowing the dilapidations mentioned in the schedule annexed to the notice. The schedule, which was headed "Schedule of dilapidations allowed to accrue in and about the" houses, indicated under general headings repairs which were required to be done to all of them and in a few instances only specified repairs to be done to particular houses.

In some instances it required the lessee to examine and repair specified parts of the houses. The schedule concluded with the words "and note that the completion of the items mentioned in this schedule does not excuse the execution of other repairs if found necessary" :—

Held by the Divisional Court, that the notice was sufficient inasmuch as it gave to the lessee the materials necessary to enable him to ascertain the breaches of covenant of which the lessor complained, and neither the fact that the notice required the lessee to do repairs which he might not be liable to do under his repairing covenants nor the general clause at the end of the schedule invalidated the notice, inasmuch as the obligation upon the lessee was only to comply with the repairing covenants and not necessarily with the terms of the notice, and as the clause at the end of the schedule did not specify any breaches it was of no effect.

Held, in the Court of Appeal, by Buckley L.J. and Kennedy L.J. (Vaughan Williams L.J. dissenting), that the notice was a good and sufficient notice under s. 14 of the Conveyancing and Law of Property Act, 1881. JOLLY *v.* BROWN **C. A. 109**

5. —— *Set-off — Claim by Tenant against Lessor for Damages for Breach of Contract—Mortgage of Reversion—Notice to Mortgagor of Tenant's Claim—Action by Mortgagees in Possession for Rent—Right of Tenant to set off Damages claimed from Lessor.*

A building company entered into an agreement with the defendant to erect and complete an hotel so as to be ready for occupation by a certain date, and the defendant agreed to take a lease of the hotel for twenty-eight years at a specified rent, as soon as it was ready for use. The building company made default in completing the hotel, but on its subsequent completion the defendant accepted a lease for the stipulated term without prejudice to any claim for damages for breach of the agreement. The company, who had obtained a head lease of ninety-nine years from the freeholder, mortgaged the same to the plaintiffs.

In an action by them, as mortgagees in possession, against the defendant for arrears of rent accrued since the date of the mortgage, the defendant sought to set off a claim for damages in respect of the company's default in not completing the hotel by the specified time, and alleged that the mortgage was taken by the plaintiffs with full notice and knowledge of that claim :—

Held (affirming the decision of Bankes J. [1913] 1 K. B. 637), that inasmuch as the right attempted to be set off was not an interest in land, but merely a claim for damages for breach of a personal covenant, the claim to set off could not be allowed.

The cases as to set-off by an assignee of a chose in action had no application to the present case.

Barnhardt v. *Greenshields* (1853) 9 Moo. P. C. 18 explained. REEVES *v.* POPE **C. A. 284**

6. —— *Surrender of Tenancy — Tenant remaining in Possession — Execution — Claim by Landlord for Rent*—8 *Anne, c.* 14, *ss.* 1, 6, 7—*County Courts Act*, 1888 (51 *&* 52 *Vict. c.* 43), *s.* 160.

Sects. 6 and 7 of 8 Anne, c. 14, enabling a landlord to distrain upon the goods of a tenant, still in possession, for rent in arrear upon a lease ended or determined, within six months after the determination of the same, are confined to cases between landlord and tenant and have no application to a case where the goods of a tenant under a subsisting tenancy are taken in execution at the suit of an execution creditor, so as to introduce into the operation of those sections, in favour of the person entitled to distrain thereunder, the advantages given by s. 1 of the statute to a landlord in the event of an execution on the goods of his tenant.

Sect. 160 of the County Courts Act, 1888, applies solely to s. 1 of the statute of Anne and does not extend in its operation to ss. 6 and 7 of that statute.

Decision of the Divisional Court (Channell and Bray JJ.) [1913] 2 K. B. 37 reversed.

Cox v. *Leigh* (1874) L. R. 9 Q. B. 333 approved. LEWIS *v.* G. DAVIES. O. E. DAVIES, CLAIMANT - - - - - **C. A. 469**

—— Interpleader—Insurance on house against fire—Insurance in names of lessor and lessee—Fires Prevention (Metropolis) Act, 1774, s. 83—"Adverse claims" *See* INTERPLEADER. **545**

—— Negligence—Dangerous premises—House let out in separate floors—Flight of steps in possession of landlord—Steps insufficiently fenced—Liability - **318** *See* NEGLIGENCE.

LARCENY—Child—Conviction for larceny—Sentence—Power to order child to be whipped—Officer to administer whipping - - - - - - - **378**
See CRIMINAL LAW. 2.

LARCENY ACT, 1861, s. 4 - - - - - **378**
See CRIMINAL LAW. 2.

LEASE—Landlord and tenant.
See under LANDLORD AND TENANT.

—— Licensing Acts.
See under LICENSING ACTS.

LETTER—Forgery—Obtaining money by forged instrument—Letter asking for money—" Instrument " - - - **209**
See CRIMINAL LAW. 3.

LICENCE—Licensing Acts.
See under LICENSING ACTS.

LICENSING ACTS—*Closing Hours—Populous Place—Cancellation of Order declaring Place to be—Licensing* (*Consolidation*) *Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *Sixth Schedule, Special Provision* 2.

The Sixth Schedule of the Licensing (Consolidation) Act, 1910, which deals (inter alia) with the determination of what areas are populous places for the purpose of the hour of closing licensed houses in such areas, enacts by Special Provision 2 that " Any order of the confirming authority of the county for the purposes of this schedule may be made from time to time at a meeting specially convened for the purpose . . . . Provided that an order restrictive of a previous order shall not be made except on a revision after the publication of a census."

A certain area had been duly declared to be a populous place. Subsequently a new census of the population was taken which shewed that the population of that area had increased, but that that of the adjoining districts had increased in a higher proportion :—

Held, that the confirming authority had jurisdiction to declare the area in question to be no longer a populous place; that the abovementioned proviso did not mean that the confirming authority could only make a restrictive order if the census shewed that the population had declined, but merely that they must take the population as shewn at the new census as one of the elements for consideration, it being open to them to hold, in view of the greater increase of population in the adjoining districts, that the standard of density in the neighbourhood had risen. NICHOLAS *v.* DAVIES **Div. Ct. 705**

2. —— *New On-Licence—Monopoly Value—Licensing* (*Consolidation*) *Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 14.

Licensing justices granted to the holder of an old beer-house licence a licence authorizing him to hold an excise licence " to sell by retail at the licensed premises . . . . spirits " for consumption either on or off the premises :—

Held, that the justices' licence was bad in form inasmuch as justices have no power under the Licensing (Consolidation) Act, 1910, to grant a licence for the sale of spirits only.

By s. 14, sub-s. 1 (*a*), of the Licensing (Consolidation) Act, 1910, the licensing justices on the grant of a new justices' on-licence shall attach to the grant of the licence such conditions as they think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear " when licensed, and the value of the same premises if they were not licensed " :—

Held, that the words " if they were not licensed " do not mean " if they were not so licensed," but " if they had no licence at all," and that (upon the assumption that the effect of the grant of the spirit licence coupled with the old beer-house licence was that the premises became fully licensed) the monopoly value of the premises was the difference between their value when fully licensed and their value if unlicensed, and was not the difference between their value when fully licensed and their value with the beer-house licence. CUSTOMS AND EXCISE COMMISSIONERS *v.* CURTIS **Div. Ct. 335**

3. —— *New On-Licence—Monopoly Value—Omission to fix Definite Capital Sum—Conditions—Annual Payment—Percentage of each Year's Gross Takings—Licensing Justices—Jurisdiction—Licence not granted " in accordance with " Act—Refusal of Retail Excise Licence—Statutory Duty of Commissioners—Licensing* (*Consolidation*) *Act*, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 1 ; *s.* 14, *sub-s.* 1 (*a*).

Licensing justices granted a new justices' on-licence without first estimating at a definite capital sum the monopoly value as defined by s. 14, sub-s. 1 (*a*), of the Licensing (Consolidation) Act, 1910, but they attached to the grant certain conditions providing that the sum to be paid as monopoly value should be an annual sum representing a percentage of each year's gross takings from the sale of intoxicants :—

Held, that monopoly value as defined by s. 14, sub-s. 1 (*a*), is a definite lump sum to be ascertained once for all; that the justices had no jurisdiction to omit this preliminary step and to attach the above conditions to the grant of the licence; and that the licence was not granted in accordance with the Act.

The Commissioners of Customs and Excise having refused to grant a retail excise licence to the holder of a justices' licence granted as above stated :—

Held, that in the circumstances and having regard to the statutory duty imposed on the Commissioners by s. 1 of the Act, which provides that an excise licence " shall not be granted except to a person who holds a justices' licence granted in accordance with this Act," the Commissioners were justified in their refusal.

Decision of the Divisional Court (Bray and Lush JJ., Avory J. dissenting) [1913] 3 K. B. 483 affirmed. REX *v.* CUSTOMS AND EXCISE COMMISSIONERS - - - - **C. A. 390**

4. —— *Renewal of Licence—Refusal by Compensation Authority to renew—Delay in Payment of Compensation—Refusal of Licensing*

LICENSING ACTS—*continued.*

Justices to grant Further Provisional Renewal of Licence—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 19—*Licensing Rules,* 1910, *rr.* 41, 42, 43.

Rule 41 of the Licensing Rules, 1910, provides that where under s. 19 of the Licensing (Consolidation) Act, 1910, the renewal authority refer the question of the renewal of a licence to the compensation authority, the renewal authority shall grant a provisional renewal of the licence.

Rule 42 provides that where the compensation authority refuse the renewal of a licence, the renewal of which is provisional, the licence shall cease to have effect as from the expiration of the seventh day after the date fixed for the payment of the compensation money.

Rule 43 provides as follows: "Where compensation becomes payable in the case of a licence provisionally renewed, and it appears to the renewal authority at the next general annual licensing meeting after the licence has been provisionally renewed that the compensation money has not been paid, and is not likely to be paid before the next fifth day of April, they shall, on a proper application being made for the purpose at that meeting, grant a further provisional renewal of the licence in accordance with the foregoing rules":—

Held, that r. 43 does not limit the power to grant a provisional renewal to one further renewal after the first grant by the renewal authority, but empowers the grant of a provisional renewal as often as may be necessary till the licence is finally extinguished.

In February, 1911, licensing justices referred the question of the renewal of a licence to the compensation authority, and in July, 1911, the compensation authority refused the renewal subject to the payment of compensation. The licence was provisionally renewed by the licensing justices in February, 1911, and again in February, 1912, and in February, 1913. As the compensation money was not likely to be paid by April 5, 1914, an application for a further provisional renewal of the licence was made to the licensing justices in February, 1914. That application was refused as the licensing justices were of opinion that the parties interested in the compensation money had unreasonably delayed the proceedings, and that but for such delay the compensation money would have been paid in such time as to make the application for the further provisional renewal unnecessary. The licensee having obtained a rule nisi for a mandamus requiring the licensing justices to hold a further meeting in order to hear and determine his application for a further provisional renewal:—

Held, that the rule must be made absolute on the ground (*per* Bray and Rowlatt JJ.) that even if there had been delay on the part of those interested in the compensation money, that was no ground for refusing to grant the provisional renewal, and (*per* Avory J.) there was no evidence that there had been any wilful delay by those parties.

Whether personal misconduct by a licensee in the carrying on of the licensed premises after the question of the renewal of his licence has been referred to the compensation authority entitles the licensing justices to refuse to grant a further provisional renewal, *quære.* REX *v.* NEWINGTON LICENSING JUSTICES. *Ex parte* MAKEMSON **Div. Ct. 710**

—— Revenue—Licensed premises—Lease—Increase of licence duty - - - **178**
See REVENUE. 6.

LICENSING RULES, 1910, rr. 41, 42, 43 - **710**
See LICENSING ACTS. 4.

LIFE INSURANCE.
See under INSURANCE (LIFE).

LIMITATION, STATUTE OF — *Contract — Rescission—Fraud—Concealed Fraud—Limitation Act,* 1623 (21 *Jac.* 1, *c.* 16), *s.* 3.

The plaintiff claimed to set aside certain transactions between himself and the defendant relating to the purchase of shares in a mining company and to recover moneys paid by him to the defendant in respect thereof. The ground of the claim was the fraud of the defendant in pretending to act as the plaintiff's stockbroker while in fact selling to the plaintiff the defendant's own shares. The transactions took place in and before August, 1906. The plaintiff did not discover the fraud until July, 1912. The action was commenced in November, 1912. The defendant used no means to conceal the cause of action. The plaintiff was guilty of no laches or other default in failing to discover the fraud earlier:—

Held, that the Limitation Act, 1623, was no bar to the action.

Bulli Coal Mining Co. v. *Osborne* [1899] A. C. 351, and *Molloy* v. *Mutual Reserve Life Insurance Co.* (1906) 94 L. T. 756, followed.

Gibbs v. *Guild* (1882) 9 Q. B. D. 59 discussed.
OELKERS *v.* ELLIS - - **Horridge J. 139**

LOCAL GOVERNMENT — *Creation of County Borough—Adjustment of Financial Relations between County and Borough—Grant of Quarter Sessions to Borough—Costs of Quarter Sessions, Petty Sessions, and Coroners—Redemption of Liability of Borough to contribute — Local Government Act,* 1888 (51 *&* 52 *Vict. c.* 41), *s.* 32, *sub-s.* 3 (*b*).

By s. 31 of the Local Government Act, 1888, certain large boroughs named in the Third Schedule to the Act (of which Middlesbrough was one) were to be county boroughs.

By s. 32, sub-s. 3 (*b*), "If the borough is not at the passing of this Act a quarter sessions borough, the borough council shall contribute a proper share of the costs of and incidental to the quarter sessions and petty sessions of the county, and of and incidental to the coroners of the county or any franchise therein, and if a grant of a Court of quarter sessions is hereafter made to the borough, the borough shall redeem the liability to such contribution, on such terms as may be agreed upon, or, in default of agreement, may be determined by arbitration under this Act."

Middlesbrough was not at the passing of the Act a quarter sessions borough, and under an order of commissioners appointed under the Act

LOCAL GOVERNMENT—*continued.*

the borough paid to the county of the North Riding of Yorkshire the annual sum of 381*l.*, of which 337*l.* 6*s.* 11*d.* represented the borough's share of the costs incurred by the county of and incidental to quarter sessions, petty sessions, and coroners. In 1910 a grant of a Court of quarter sessions was made to the borough.

In an arbitration to determine the terms upon which the liability of the borough to make the contribution of the annual sum of 337*l.* 6*s.* 11*d.* should be redeemed, the county council refused to call evidence, contending that the sum should be redeemed at its present value as a perpetual annuity. The borough called evidence (which was objected to but admitted by the arbitrator) to the effect that the share of the costs of quarter sessions, petty sessions, and coroners of the county incurred in respect of the borough exceeded in each year the said annual sum. The arbitrator found that the above-mentioned share of the costs exceeded the annual sum, and he made his award in the form of a special case stating that if the evidence was admissible he awarded that the annual sum should be redeemed on payment of 20*s.*; that if the evidence was not admissible and if the annual sum should be redeemed at its present value as a perpetual annuity, he awarded that it should be redeemed on payment of 10,379*l.* 17*s.* 5*d.*; but that if the evidence was not admissible and also the annual sum should be redeemed on some other basis than that of a perpetual annuity, the matter was to be remitted to him for reconsideration.

Bailhache J. held that the evidence was admissible, but remitted the matter to the arbitrator for reconsideration.

Held, on appeal, that the county council were not entitled to have the annual sum redeemed at its present value as a perpetual annuity; that evidence was admissible to shew on the one hand the benefit to the county through having no longer to render the services to the borough and on the other hand the continuing burden on the county owing to liabilities which had been already incurred in respect of those services and could not be terminated at once; that therefore the evidence was properly admitted; and that judgment must be entered for 20*s.* in accordance with the terms of the award as stated in the special case, the Court having no power in these circumstances to remit the matter.

Decision of Bailhache J. [1913] 1 K. B. 93 varied. NORTH RIDING OF YORKSHIRE COUNTY COUNCIL *v.* MIDDLESBROUGH COUNTY BOROUGH COUNCIL - - - - - - **C. A. 847**

2. —— *Land adjoining Street—Insufficiency of Fence—Use of Land for Purposes causing Inconvenience or Annoyance to the Public—Jurisdiction of Justices—Willesden Urban District Council Act*, 1903 (3 *Edw.* 7, *c. clxxxi.*), *s.* 32.

By s. 32 of the Willesden Urban District Council Act, 1903, it is provided that "If any land in the district . . . . adjoining any street is allowed to remain unfenced or the fences thereof are allowed to be or remain out of repair, and such land is in the opinion of the council owing to the absence or inadequate repair of any such fence a source of danger to passengers, or is used for any immoral or indecent purposes or for any purpose causing inconvenience or annoyance to the public" the council may require the owner of the land to put up a sufficient fence, and on his default may do the work themselves and recover the expenses from him summarily as a civil debt:—

Held by the Court of Appeal, reversing the decision of the Divisional Court, that it is for the justices before whom proceedings for the recovery of the expenses are taken, and not for the council, to determine whether the land "is used for any immoral or indecent purposes or for any purpose causing inconvenience or annoyance to the public." UPJOHN *v.* WILLESDEN URBAN DISTRICT COUNCIL - - - - **C. A. 85**

3. —— *Sanitary Authority—Sewage flowing into Little Creek—Part of or Tributary of the Thames—"Caused or suffered"—Thames Conservancy Act*, 1894 (57 *&* 58 *Vict. c. clxxxvii.*), *ss.* 90, 94.

For many years prior to 1909 crude sewage passed from premises of private persons into two sewers which had not been constructed by, but were vested in, the appellants as the sanitary authority, and thence passed into Little Creek. In 1909 the appellants constructed a chamber in each of the two sewers for the purpose of intercepting solid matter and preventing it from being discharged into Little Creek, but the effluent from those chambers still contained sewage matter. In proceedings against the appellants under s. 94 of the Thames Conservancy Act, 1894, for suffering sewage to pass into Little Creek, which was either a part of the Thames or a tributary thereof within s. 90 of the Act:—

Held, (1.) that Little Creek was a part of the Thames or a tributary thereof, and (2.) that the appellants had "caused or suffered" sewage to flow or pass into Little Creek within s. 94.

Reg. v. *Staines Local Board* (1888) 60 L. T. 261 distinguished.

Per Avory J.: *Reg.* v. *Staines Local Board* and the decisions following thereon—*Thames Conservators* v. *Gravesend Corporation* [1910] 1 K. B. 422 and *Waltham Holy Cross Urban District Council* v. *Lee Conservancy Board* (1910) 103 L. T. 192—are inconsistent with the decisions of the Court of Appeal in *Kirkheaton District Local Board* v. *Ainley* [1892] 2 Q. B. 274 and *Yorkshire West Riding Council* v. *Holmfirth Urban Sanitary Authority* [1894] 2 Q. B. 842, and are therefore not binding. ROCHFORD RURAL DISTRICT COUNCIL *v.* PORT OF LONDON AUTHORITY - - **Div. Ct. 916**

—— Buildings—By-laws—Infringement — Part of old building pulled down and new part erected—"New building"—Plans of whole building—Public Health Acts Amendment Act, 1907, s. 23 - **798**
See BUILDINGS.

—— Sanitary authority — Highway — Sewer — Defective gully — Negligence — Nonfeasance—Misfeasance - - - **89**
See LONDON. 2.

LOCAL GOVERNMENT—*continued.*

—— Sanitary authority—Proceedings against—River — Pollution — Sewer vested in local sanitary authority - - **13**
See RIVER.

LONDON—*Building Notice—New Buildings — Public Elementary School — Alterations — "Provision dealing with construction of new buildings"—London Building Act*, 1894 (57 *&* 58 *Vict. c. ccxiii.*), *s.* 145—*Education (Administrative Provisions) Act*, 1911 (1 *&* 2 *Geo.* 5, *c.* 32), *s.* 3.

By s. 145 of the London Building Act, 1894, where a building is about to be begun, then two clear days before it is begun the builder or other person causing or directing the work to be executed shall serve on the district surveyor a building notice as therein prescribed. By s. 200, sub-s. 11, any person who, being a person who ought to serve a building notice, fails to do so is liable to a penalty.

By s. 3 of the Education (Administrative Provisions) Act, 1911, the provisions of any by-laws made by any local authority under s. 157 of the Public Health Act, 1875, with respect to new buildings (including provisions as to the giving of notices and deposit of plans and sections), and any provisions in any local Act dealing with the construction of new buildings, shall not apply to the case of any new buildings being school premises to be erected according to plans which are required to be and have been approved by the Board of Education.

A firm of builders had entered into a contract with the London County Council as the education authority for the county of London for the erection of certain new buildings to be erected as a public elementary school according to plans approved by the Board of Education. No building notice was given to the district surveyor. The builders were convicted of an offence under the London Building Act, 1894. Upon a case stated:—

Held, that s. 145 of that Act was a provision in a local Act "dealing with the construction of new buildings" within the meaning of s. 3 of the Education (Administrative Provisions) Act, 1911, and therefore did not apply to the buildings in question; and consequently that the conviction was wrong. HOLLIDAY AND GREENWOOD LIMITED *v* DISTRICT SURVEYORS' ASSOCIATION AND DICKSEE - **Div. Ct. 803**

2. —— *Sanitary Authority — Highway — Sewer — Defective Gully — Negligence — Nonfeasance — Misfeasance — Local Government — Metropolis Management Act*, 1855 (18 *&* 19 *Vict. c.* 120), *ss.* 68, 69, 96—*Metropolis Management (Battersea and Westminster) Act*, 1887 (50 *&* 51 *Vict. c.* 17), *s.* 4—*London Government Act*, 1899 (62 *&* 63 *Vict. c.* 14), *s.* 4.

By s. 68 of the Metropolis Management Act, 1855, the sewers therein described situate in any parish mentioned in Sched. A to the Act, with the gullies, grates, works, and things thereunto appertaining, became vested in the vestry of such parish; and other sewers situate within any district mentioned in Sched. B to the Act, with all such works and things as aforesaid, became vested in the board of works for such district, and all sewers made and to be made within any

LONDON—*continued.*

such parish or district, except as therein mentioned, were vested in the vestry or board respectively.

By s. 69 the vestries and boards were to repair and maintain the sewers vested in them, and to cause to be made, repaired, and maintained such sewers and works as might be necessary for effectually draining their parish or district.

By s. 96 every vestry and district board within their parish or district were to execute the office, to have the powers and duties, and to be subject to the liabilities of the surveyor of highways.

The Wandsworth district, including the parish of St. Mary, Battersea, was one of the districts mentioned in Sched. B. In the year 1883 the Wandsworth District Board of Works constructed a gully with a grid or grating in connection with a sewer in L. Road situate in the parish of St. Mary, Battersea, and vested in them as aforesaid. The gully was negligently executed and was allowed to remain in a defective condition.

By s. 4 of the Metropolis Management (Battersea and Westminster) Act, 1887, the parish of St. Mary, Battersea, ceased to form part of the Wandsworth district, and it was enacted that the Metropolis Management Act, 1855, should "be read and have effect as if the said parish . . . . had been named in Part II. of Schedule A of the said Act"; the vestry of the said parish became a body corporate by the name of the Vestry of the Parish of St. Mary, Battersea; the other parishes named in Sched. B to the Act of 1855 as forming the Wandsworth district were to form the Wandsworth district for the purposes of the Act; and the Wandsworth District Board of Works continued to be a body corporate.

By s. 4 of the London Government Act, 1899, the vestry of the parish of St. Mary, Battersea, ceased to exist, and the powers duties, property, and liabilities of the vestry were transferred to the defendants as successors thereto.

The plaintiff while riding along L. Road was, owing to the defective condition of the gully, thrown from her bicycle and injured. She brought an action against the defendants for damages for the injuries sustained:—

Held, that the effect of s. 4 of the Metropolis Management (Battersea and Westminster) Act, 1887, was not to transfer to the vestry of the parish of St. Mary, Battersea, any existing liability of the Wandsworth District Board of Works in respect of the defective gully; and consequently that no such liability was transferred to the defendants by s. 4 of the London Government Act, 1899.

But *held* that, although not liable as the highway authority, the defendants were liable as the sewer authority for not remedying the defect in the gully.

Cowley v. *Newmarket Local Board* [1892] A. C. 345; *White* v. *Hindley Local Board* (1875) L. R. 10 Q. B. 219; and *Blackmore* v. *Vestry of Mile End Old Town* (1882) 9 Q. B. D. 451, followed. PAPWORTH *v.* BATTERSEA CORPORATION - - - - - - **Horridge J. 89**

LONDON—*continued.*

—— Insurance on house against fire—Insurance in names of lessor and lessee—"Adverse claims" - - - - - - 545
See INTERPLEADER.

—— Rates.
See under RATES.

LOTTERY—*Prize Competition—Exercise of Skill—Result not depending entirely on Chance—Lotteries Act*, 1823 (4 *Geo.* 4, *c.* 60), *s.* 41.

The proprietors of a newspaper published therein an advertisement of a competition for money prizes, the terms of which were that each competitor was to select one of a number of given words and compose a short sentence which defined or illustrated the word selected, the initial letter of each word in the sentence to be a letter occurring in the selected word; that all the sentences reaching the editor of the newspaper should receive careful consideration; and that the decision of the editor as to the prize-winners should be final:—

Held, that as the competition was one involving some degree of skill on the part of the competitors, and as there was no evidence that the number of competitors was so large as to make it impossible for the sentences to be considered on their merits, the competition was not one the result of which depended entirely on chance, and that it was, therefore, not a lottery within s. 41 of the Lotteries Act, 1823.

Blyth v. *Hulton* (1908) 72 J. P. 401 distinguished. SCOTT *v.* DIRECTOR OF PUBLIC PROSECUTIONS - - - - Div. Ct. 868

MAGISTRATES.
See under JUSTICES.

MAINTENANCE—Infant.
See under INFANT.

MALICIOUS PROSECUTION—*Damage necessary to support Action for—Summary Proceedings to compel Abatement of a Nuisance—Damage to Reputation—Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 95.

A complaint under s. 95 of the Public Health Act, 1875, for non-compliance with a notice to abate a nuisance is a proceeding involving damage to the defendant's fair fame sufficient to support an action by him for malicious prosecution in the event of the complaint having been preferred maliciously and without reasonable and probable cause.

Rayson v. *South London Tramways Co.* [1893] 2 Q. B. 304 followed. WIFFEN *v.* BAILEY AND ROMFORD URBAN DISTRICT COUNCIL - - - - Horridge J. 5

MARINE INSURANCE.
See under INSURANCE (MARINE).

MARRIED WOMAN — Judgment—Amendment—Accidental slip—Practice—Judgment wrongly entered against married woman
See JUDGMENT. 734

MASTER AND SERVANT—Seduction of wife's adopted daughter—Household services rendered by adopted daughter — Whether action will lie at suit of wife
See SEDUCTION. 781

MEDICAL CERTIFICATE — that member suffering from "debility"—Sufficiency of certificate—Dispute between member and society - - - - - 233
See INSURANCE (HEALTH).

METROPOLIS.
See under LONDON.

MINE — *Coal Mine—Colliers working in a Sett—Fillers working with Colliers—Fillers' Wages paid by Colliers—Liability of Colliery Owners to Fillers for Wages—Coal Mines (Minimum Wage) Act*, 1912 (2 *Geo.* 5, *c.* 2).

The plaintiff was a filler employed at the defendants' colliery. In that colliery the coal was worked by colliers in setts. Each sett consisted of two or more colliers, and to each sett one or more fillers were attached. The fillers' duty was to load the tubs with the coal when gotten by the colliers, and the tubs were then sent to the surface, where the weight of the coal sent up was credited to the sett. The colliers were paid by the defendants at the end of each week according to the weight of the coal credited to the sett, one of the colliers, called the contractor, receiving payment of the amount due to the sett. A filler was paid a daily wage, which had been for some years before the passing of the Coal Mines (Minimum Wage) Act, 1912, 5*s.* 11*d.* less 2*d.* for subscriptions, and he was paid his remuneration each week by the contractor of the sett out of the money received by him from the defendants. The filler was engaged by the colliery manager; he as well as the colliers signed a document headed "Terms of Employment," under which he agreed to be bound by the regulations of the colliery; he was sent by an official of the colliery to work with a sett, and if the sett were dissatisfied with him it asked the management to remove him; and his dismissal rested with the management. There was evidence that, apart from an arrangement made in 1908 between colliery owners and colliers as to "hard or difficult places," no allowance was made by the defendants when paying the contractor of the sett in respect of the fillers' wages, that the fillers looked to the contractor for payment, and that if the amount paid by the defendants to the contractor was not sufficient to pay all, the contractor was still bound to pay the filler his full wages. After the passing of the Coal Mines (Minimum Wage) Act, 1912, the minimum rate of wages for a filler was fixed at 4*s.* 10*d.* a day. For the week ending June 19, 1912, the contractor paid the plaintiff at the rate of 4*s.* 10*d.* a day, and the plaintiff brought an action in the county court against the defendants to recover the balance of the wages, namely, the difference between 4*s.* 10*d.* and 5*s.* 11*d.* a day. The county court judge found that there was a custom to pay a filler 5*s.* 9*d.* per day clear, that the collier had always paid it out of his tonnage wages (except in case of payment under the hard and difficult place agreement), but that there was no privity of contract between the defendants and the filler. He accordingly gave judgment for the defendants. The Divisional Court held that the evidence was conclusive that the defendants were the employers

MINE—*continued.*

of the plaintiffs and bound to pay him his wages, and they gave judgment for the plaintiff:—

Held by the whole Court, that there was evidence upon which the county court judge was entitled to find that apart from the Coal Mines (Minimum Wage) Act, 1912, there was no privity of contract under which the plaintiff could claim wages from the defendants.

With regard to the Coal Mines (Minimum Wage) Act, 1912:—

Held by Vaughan Williams L.J., that the effect of the Act was to render the defendants as colliery owners liable to pay the plaintiff his wages.

Held by Buckley and Kennedy L.JJ., that the Act did not make any alteration in the person liable to pay the wages, and did not create a contract to pay wages where none existed independently of the Act, and that the defendants were not liable to the plaintiff. RICHARDS *v.* WREXHAM AND ACTON COLLIERIES, LIMITED. DAVIES *v.* SAME **C. A. 497**

2. —— *Coal Mine—Minimum Wage—Wages exceeding Minimum—Regularity and Efficiency—District Rules—Action for Wages—Condition Precedent—Coal Mines (Minimum Wage) Act,* 1912 (2 *Geo.* 5, *c.* 2), *s.* 1.

By s. 1, sub-s. 1, of the Coal Mines (Minimum Wage) Act, 1912, it is made an implied term of every contract for the employment of a workman underground in a coal mine that the employer shall pay to the workman wages at not less than the minimum rate settled under the Act and applicable to the workman, unless it is certified in manner provided by the district rules that the workman is a person excluded under the district rules from the operation of the sub-section or that the workman has forfeited the right to wages at the minimum rate by reason of his failure to comply with the conditions laid down by those rules with respect to regularity or efficiency of his work. By sub-s. 2 the district rules are to lay down conditions with respect to the regularity and efficiency of the work and to provide that a workman shall forfeit the right to wages at the minimum rate if he does not comply with the conditions, except as therein mentioned. The district rules are also to provide for the persons by whom and the mode in which any question whether a workman is one to whom the minimum rate of wages is applicable, or whether a workman has complied with the conditions laid down by the rules, or whether a workman who has not complied with those conditions has forfeited his right to wages at the minimum rate, is to be decided. District rules were duly made under this enactment.

A miner was employed at a rate of wages exceeding the minimum rate settled under the Act and consisting of the minimum rate increased by a sum per day payable through the action of a conciliation board and by a further sum payable by the custom of the district to miners in his position. He sued his employers in the county court to recover six days' wages. The employers claimed to make a deduction from the wages on the ground that the miner had failed to comply with the conditions with respect to regularity and efficiency laid down by the district rules. It was not disputed that if the case was within the Act the miner had no cause of action until the dispute had been decided as provided by the district rules:—

Held, that the case was within the Act, notwithstanding that the rate of wages exceeded the minimum rate as settled under the Act. FAIRBANKS *v.* FLORENCE COAL AND IRON COMPANY, LIMITED - - - **Div. Ct. 461**

MISCONDUCT—Agricultural holdings—Arbitration—"Misconduct"—Competency of appeal to Divisional Court - - **478**
See LANDLORD AND TENANT. 1.

MISFEASANCE—Sanitary authority—Highway—Sewer—Defective gully—Negligence—Nonfeasance - - - - **89**
See LONDON. 2.

MISTAKE — Lease — Covenant by lessee — "Assessments charged on the premises" — Inhabited house duty — Landlord assessed by mistake—Payment by landlord—Implied request - - - **361**
See LANDLORD AND TENANT. 2.

MONEY-LENDER — *Security taken by — Registered Name — Money-lenders Act,* 1900 (63 *&* 64 *Vict. c.* 51), *s.* 2, *sub-s.* 1 (*c*).

The provision in s. 2, sub-s. 1 (*c*), of the Money-lenders Act, 1900, that a money-lender "shall not . . . . take any security for money in the course of his business as a money-lender otherwise than in his registered name" means that he shall not take it in a name other than his registered name; it does not prohibit him from taking a security on which his name does not appear at all, such as a bill of exchange indorsed to him in blank. SHAFFER *v.* SHEFFIELD **Channell J. 1**

2. —— *Transaction harsh and unconscionable—Excessive Interest — Questions of Law or of Fact—Money-lenders Act,* 1900 (63 *&* 64 *Vict. c.* 51), *s.* 1.

By s. 1, sub-s. 1, of the Money-lenders Act, 1900, where proceedings are taken in any Court by a money-lender for the recovery of any money lent or the enforcement of any agreement or security made or taken in respect of money lent, and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, or other charges are excessive, and that, in either case, the transaction is harsh and unconscionable, the Court may reopen the transaction and take an account between the parties and relieve the party sued as therein mentioned:—

Held, that the questions whether the interest is excessive and whether the transaction is harsh and unconscionable are not questions for a jury, but are for the judge. ABRAHAMS *v.* DIMMOCK **Div. Ct. 372**

MONOPOLY VALUE—Licensing Acts - **390**
See LICENSING ACTS. 3.

—— Licensing Acts—New on-licence - **335**
See LICENSING ACTS. 2.

MORTGAGE — Book debts — Receiver — Bankruptcy of mortgagor—Notice of assignment—Order and disposition - 910
See BANKRUPTCY. 6.

—— Landlord and tenant — Action by mortgagees in possession for rent—Right of tenant to set off damages claimed from lessor - - - - - - 284
See LANDLORD AND TENANT. 5.

MOTION—Contempt of Court — Attachment—Motion for, against limited company
See CONTEMPT OF COURT. 866

MOTOR OMNIBUS — Corporation — By-law — Wilful obstruction of corporation's servants in execution of their duty 762
See CORPORATION.

NAME—Money-lender — Security taken by — Registered name - - - - 1
See MONEY-LENDER. 1.

—— Solicitor—Illegal agreement — Permitting name to be used for profit of unqualified person - - - - - - 411
See SOLICITOR. 2.

NATIONAL INSURANCE.
See under INSURANCE (NATIONAL).

NEGLIGENCE—*Dangerous Premises—House let out in Separate Floors—Flight of Steps in Possession of Landlord — Steps insufficiently fenced — Liability of Landlord to Wife of Tenant—Knowledge on Part of Tenant's Wife of insufficient fencing of Steps.*

The defendant was the owner of a house which consisted of a basement and two upper floors, the rooms on each floor being separately let. The house was entered by a front door on the ground floor level which was approached from the street by a flight of six or seven steps, these steps being protected on each side by a coping about eight inches high. On either side of the steps was an area. The steps remained in the defendant's possession and control. The plaintiff, the wife of one of the tenants occupying the house, slipped on the steps and fell into the area, sustaining considerable injuries. In an action by the plaintiff against the defendant claiming damages in respect of those injuries, the jury found that the defect in the steps in consequence of which the accident occurred consisted not in any disrepair of the steps themselves, but in the absence of a railing; that this defect was due to the negligence of the defendant; and that both the plaintiff and the defendant knew before the accident of the existence of the defect:—

Held, that the only obligation upon the defendant in reference to the approach to the house was to avoid exposing the plaintiff to any unexpected danger without giving her warning; that as the danger was patent to every one, and the plaintiff in fact knew of it, she had voluntarily taken upon herself to bear the risk; and, therefore, that she had established no cause of action.

Miller v. *Hancock* [1893] 2 Q. B. 177 considered and distinguished.

Huggett v. *Miers* [1908] 2 K. B. 278 followed.
LUCY *v.* BAWDEN - - - Atkin J. 318

—— Railway company — Negligence — Duty towards invitees—Station yard—Open culvert—Horse and cart unattended—Contributory negligence - - 153
See RAILWAY. 1.

—— Sanitary authority — Highway — Sewer — Defective gully - - - - 89
See LONDON. 2.

—— Workmen's compensation—Action by widow for negligence—Death of workman—Claim by children—Payment of compensation—Option—Election - 61
See EMPLOYER AND WORKMAN. 5.

NEW TRIAL.
See under TRIAL.

NONFEASANCE—Sanitary authority—Highway—Sewer—Defective gully—Negligence—Misfeasance - - - - 89
See LONDON. 2.

NOTICE—Assignment—Mortgage of book debts—Receiver—Bankruptcy of mortgagor—Order and disposition - - 910
See BANKRUPTCY. 6.

—— Building notice — New buildings—Public elementary school—Alterations - 803
See LONDON. 1.

—— Landlord and tenant—Covenant to repair—Specification of particular breach complained of—Addition of general clause—Sufficiency of notice - - - 109
See LANDLORD AND TENANT. 4.

NUISANCE — Malicious prosecution—Damage necessary to support action for — Damage to reputation - - 5
See MALICIOUS PROSECUTION.

OBJECTION—Criminal law—Indictment - 99
See CRIMINAL LAW. 7.

OMNIBUS—Motor omnibus.
See under MOTOR OMNIBUS.

OPTION—Workmen's compensation—Election
See EMPLOYER AND WORKMAN. 5. 61

ORDER AND DISPOSITION—Bankruptcy 910
See BANKRUPTCY. 6.

PARTIES—Action of debt against unincorporated society—Order authorizing one or more to defend on behalf of all 930
See PRACTICE. 3.

—— Joinder of defendants—Separate causes of action—Policy underwritten by defendants for separate amounts - - 747
See PRACTICE. 4.

PASSAGE MONEY—Salvage - - - 682
See INSURANCE (MARINE).

PLATELAYER — Workmen's compensation — Railway company—"Concurrent contracts of service"—Ejusdem generis
See EMPLOYER AND WORKMAN. 4. 53

PLEA—Autrefois acquit — Two offences substantially the same - - - 570
See CRIMINAL LAW. 6.

PLEADING — Criminal law — Indictment — Duplicity — Objection — Appeal—"No substantial miscarriage of justice" 99
See CRIMINAL LAW. 7.

PLEDGE — Banker — Deposit of securities by broker—Authority of broker to pledge —Estoppel — Purchase for value in good faith - - - - 168
See BANKER.

POLICY—Insurance (Life).
See under INSURANCE (LIFE).

—— Insurance (Marine).
See under INSURANCE (MARINE).

POLLUTION—River.
See under RIVER.

POOR RATE.
See under RATES.

PRACTICE—*Appeal from County Court—Non-appearance of Respondent—Motion to reinstate —Jurisdiction of High Court — Rules of the Supreme Court*, 1883, *Order XXXVI.*, *r.* 33; *Order LIX.*, *r.* 16.

The plaintiff brought an action in the county court and recovered judgment. The defendant appealed. By some inadvertence the plaintiff, respondent to the appeal, was not represented at the hearing of the appeal.

The Divisional Court in the absence of the plaintiff heard the appeal, reversed the judgment of the county court, and ordered judgment to be entered for the defendant. The plaintiff on hearing of the result of the appeal, after the order of the Divisional Court had been passed and entered, applied to the Court to reinstate and rehear the appeal:—

Held, that the Court had no jurisdiction to grant the application.

In re St. Nazaire Co. (1879) 12 Ch. D. 88 followed. HESSION *v.* JONES - **Div. Ct. 421**

2. —— *Jury Action—Disagreement of Jury—Application for Judgment—Appeal—Power to enter Judgment—Rules of the Supreme Court*, 1883, *Order XXXVI.*, *r.* 39; *Order LVIII.*, *r.* 4.

In an action tried with a jury the judge was asked at the conclusion of the plaintiff's case to withdraw the case from the jury on the ground that the plaintiff had failed to make any case against the defendants. The judge refused to do so. Witnesses were then called for the defence. The jury disagreed. Subsequently an application was made to the judge to enter judgment for the defendants upon the above ground and also upon the ground that upon all the evidence in the case the jury could not reasonably have found a verdict for the plaintiff. The judge refused to enter judgment for the defendants. On appeal from his refusal to do so:—

Held by Lord Reading C.J. and Buckley L.J., that the Court of Appeal has power under Order LVIII., r. 4 (and, per Buckley L.J., a judge at the trial also has power under Order XXXVI., r. 39), to enter judgment for a defendant if upon the case as a whole the evidence for the plaintiff was so weak that a verdict in his favour would have been set aside as unreasonable.

Millar v. *Toulmin* (1886) 17 Q. B. D. 603, *Allcock* v. *Hall* [1891] 1 Q. B. 444, and *Paquin* v. *Beauclerk* [1906] A. C. 148, followed.

Per Phillimore L.J.: The Court of Appeal ought to enter judgment only in a case where on the evidence the jury should have been directed to find a verdict one way, there being no evidence to support a verdict the other way, and ought not to do so in a case in which there is some evidence for the jury, even though the case is such that if the verdict is one way a new trial might be ordered on the ground that the verdict was unreasonable.

Held, also, by the Court, that on the facts of this case judgment ought not to be entered for the defendants.

A judge who at the conclusion of the plaintiff's case has ruled that there is some evidence for the jury is entitled at the conclusion of the whole case to reconsider his ruling and to enter judgment for the defendant if he is then of opinion that the plaintiff's evidence fails to disclose any cause of action against the defendant.

Peters v. *Perry* (1894) 10 Times L. R. 366 considered. SKEATE *v.* SLATERS, LIMITED
C. A. 429

3. —— *Parties—Action of Debt against Unincorporated Society—"Persons having the same interest in one cause or matter"—Order authorizing one or more to defend on behalf of all—Rules of the Supreme Court, Order XVI.*, *r.* 9.

In a common law action of debt for professional services rendered the plaintiff sued four named defendants "on their own behalf and on behalf of all other members of" an unincorporated religious society, most of the members of which resided abroad. After a defence had been delivered, the plaintiff, with a view to binding the society and its property, took out a summons under Order XVI., r. 9, asking that the writ and all subsequent proceedings be amended by describing the defendants as being "sued on their own behalf and on behalf of all other members of" the society, and further asking that "as the members of the said order are numerous and the above-named defendants are some of them, they be directed to defend the action on behalf of or for the benefit of all persons so interested, pursuant to Order XVI., r. 9." The four defendants were not trustees of the society:—

Held, that the plaintiff was not entitled to a representation order under Order XVI., r. 9. WALKER *v.* SUR - - - - **C. A. 930**

PRACTICE—*continued.*

4. —— *Parties—Joinder of Defendants—Separate Causes of Action—Policy underwritten by Defendants for Separate Amounts—Service out of Jurisdiction—"Necessary or proper party"—Rules of the Supreme Court,* 1883, *Order* XI., *r.* 1 (*g*); *Order* XVI., *r.* 4.

The plaintiffs, who were export merchants carrying on business in Vienna, brought an action against two insurance companies upon certain policies of marine insurance on goods. One of the companies was registered as a limited company in England and the other in Scotland. The policies were in identical form, and were drawn up at Antwerp in the French language and were signed by a common agent for both companies. Each policy was for a certain amount upon goods carried in a named ship, and it stated that the undersigned insured respectively the amounts stated by each of them at the foot thereof. At the foot each company was stated to insure in halves for the total sum insured, and against the name of each company, who were described as of London, was placed a figure representing one half of the total amount insured. The companies had a common office and a common secretary in London, and in all letters written by them to the plaintiffs' solicitors relating to the matter the London office was described as the head office of the companies. The plaintiffs served the writ upon the English company within the jurisdiction, and obtained an order giving them leave to issue and serve a concurrent writ on the Scottish company in Scotland under Order XI., r. 1 (*g*). The Scottish company applied to set the order aside upon the ground that they were not "proper parties" to the action, the cause of action against each company being different:—

Held, that under Order XVI., r. 4, the Scottish company could be joined as defendants in the action, and that therefore they were proper parties to the action within the meaning of Order XI., r. 1 (*g*), and the order was rightly made. OESTERREICHISCHE EXPORT A. G. VORM. A. JANOWITZER *v.* BRITISH INDEMNITY INSURANCE COMPANY, LIMITED - **C. A. 747**

—— Appeal.
See under APPEAL.

—— Bankruptcy.
See under BANKRUPTCY.

—— Costs.
See under COSTS.

—— Execution.
See under EXECUTION.

—— Judgment.
See under JUDGMENT.

—— Rates.
See under RATES.

PREMIUMS—Insurance (Life).
See under INSURANCE (LIFE).

PRINCIPAL AND AGENT—*Commission—House Agent — Lease of House — Subsequent Sale to Tenant—"Efficient cause of Sale."*

The test stated by Collins M.R. in *Millar* v. *Radford* (1903) 19 Times L. R. 575, as to whether a house agent, who is employed to let or sell a house, is entitled to be paid commission on the introduction of a person who subsequently becomes the tenant or the purchaser, as the case may be, namely, whether "the introduction was an efficient cause in bringing about the letting or the sale," and not merely a causa sine qua non, approved and followed.

In 1908 the plaintiff, who was a house agent, was employed by the defendant to find a tenant for a house at a rent of 120*l.* a year or a purchaser for 2500*l.* The plaintiff found a tenant who took the house for a term of three years with the option of continuing the tenancy for five or seven years at the rent of 110*l.* a year, and he was paid commission on the letting. At the end of the three years the tenant, as a condition of his continuing the tenancy for a further term, required the defendant to build an addition to the house. The defendant refused to do so, and thereupon the question of purchasing the house arose, and the defendant agreed to sell it to the tenant's wife for 1900*l.* The plaintiff, after the original letting, had nothing to do with the negotiations which led up to the sale. The plaintiff sued the defendant in the county court to recover commission on the sale. The county court judge found that, though the plaintiff introduced the property to the tenant and his wife, that introduction was not the effective cause of the subsequent sale, and he gave judgment for the defendant:—

Held, that the county court judge had applied the proper test, and had found against the plaintiff's claim upon evidence which entitled him so to find, and that his decision must be affirmed. NIGHTINGALE *v.* PARSONS - **C. A. 621**

PROMOTER—Company.
See under COMPANY.

PROOF — Bankruptcy — Company promoter — Underwriting contract—Omission from prospectus—Death before completion of contract - - - - - - **299**
See BANKRUPTCY. 2.

—— Workmen's compensation — Industrial disease—Burden of proof - - **213**
See EMPLOYER AND WORKMAN. 6.

PROSECUTION—Malicious.
See under MALICIOUS PROSECUTION.

PROSPECTUS—Company.
See under COMPANY.

PROSTITUTION — Living on earnings of — Indictment — Jurisdiction of quarter sessions to try—Charge in respect of one specified day only—Validity of indictment - - - - - - **386**
See CRIMINAL LAW. 5.

PUBLIC HEALTH—Buildings.
See under BUILDINGS.

—— Malicious prosecution—Damage necessary to support action for — Damage to reputation - - - - - - **5**
See MALICIOUS PROSECUTION.

PUBLIC HEALTH—*continued.*

—— River—Pollution—Sewer vested in local sanitary authority—Proceedings against sanitary authority - - **13**
See RIVER.

—— Streets.
See under STREETS.

PURCHASE—for value in good faith—Banker—Deposit of securities by broker—Authority of broker to pledge—Estoppel **168**
See BANKER.

QUARTER SESSIONS—Prostitution, Living on earnings of—Indictment—Jurisdiction of quarter sessions to try—Charge in respect of one specified day only—Validity of indictment - - **386**
See CRIMINAL LAW. 5.

RAILWAY—*Negligence—Railway Company—Duty towards invitees—Station Yard—Open Culvert—Horse and Cart unattended—Contributory Negligence.*

A railway company occupied a station yard with an approach thereto. The plaintiff was in the habit of going himself or sending his driver to the station yard with a horse and cart to receive or deliver goods. The yard was bounded on one side by a sloping bank at the bottom of which was an open culvert. Both the plaintiff and his driver knew the place well. On the occasion in question the driver drove the horse and cart up to the door of the weighing office. The sloping bank was forty feet behind the cart. He left the horse and cart unattended, as he and other drivers usually did, and went into the office, where he remained for a few minutes. The horse in his absence backed the cart over the bank and was dragged backwards into the culvert and injured.

In an action in the county court against the company for negligence, the jury found a verdict for the plaintiff. The county court judge entered judgment in accordance with the verdict. On appeal:—

Held, per curiam (Bray and Lush JJ.), that the duty of a railway company towards persons resorting to their stations and yards in the ordinary course of business is higher than that of the occupier of private premises towards persons resorting to such premises in the like manner; and that railway companies are bound to take reasonable care to have their premises reasonably safe for persons using them in the ordinary and customary manner and with reasonable care.

Held, per Bray J., that there was evidence of a breach of this duty causing the accident, and that the question of contributory negligence was for the jury.

Held, per Lush J., that there was no evidence of any breach of the duty causing the accident; that the effective cause of the accident was the negligence of the driver in leaving the horse unattended; and that, if this amounted to contributory negligence, the Court ought in the circumstances, notwithstanding the verdict of the jury, to hold that there was contributory negligence. NORMAN *v.* GREAT WESTERN RAILWAY COMPANY - - - - - - **Div. Ct. 153**

2. —— *Undue Preference by Railway Company of themselves as Carriers—Legitimate Competition—Through Rate—Proportion of Rate appropriated to Conveyance by Sea—Particulars in Rate-book—Railway and Canal Traffic Act,* 1888 (51 *&* 52 *Vict. c.* 25), *s.* 33, *sub-s.* 5.

The applicants, who were carriers, conveyed goods in their own steamers between Dublin and Manchester, the goods being carried on the defendant company's railway between Manchester and certain towns in England. The defendant company carried goods at a through rate between the same towns in England and Dublin via Holyhead, the land transit being over the defendant company's railway, and the sea transit being performed by their steamers. The defendant company by allowing rebates to the consignors of goods reduced the rate per mile for the land carriage via Holyhead so that it was less than the rate for the land carriage via Manchester. The applicants alleged that the defendant company thereby unduly preferred themselves as carriers:—

Held, on the evidence, that the reduction was the natural result of, and necessary for, fair competition, and that it, therefore, did not constitute an undue preference by the defendant company of themselves.

Sect. 33, sub-s. 5, of the Railway and Canal Traffic Act, 1888, provides that: "Where a railway company carries merchandise partly by land and partly by sea, all the books, tables, and documents, touching the rates of charge of the railway company, which are kept by the railway company at any port in the United Kingdom used by the vessels which carry the sea traffic of the railway company, shall, besides containing all the rates charged for the sea traffic, state what proportion of any through rate is appropriated to conveyance by sea, distinguishing such proportion from that which is appropriated to the conveyance by land on either side of the sea."

The defendant company's rate-book at Dublin contained a notice that "The sea proportion of rates in this book between Dublin and English stations is represented by a mileage share as for 70 miles of the throughout distance":—

Held, that this notice was a sufficient compliance with the requirements of s. 33, sub-s. 5.

Held, also, that the particulars of the proportion of a through rate appropriated to the conveyance by sea need not appear in the rate-book kept at a port which is not the port at which the merchandise is received for conveyance but is a port of call only. DUBLIN AND MANCHESTER STEAMSHIP COMPANY *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY
Railway and Canal Commission 192

—— Workmen's compensation — Platelayer — "Concurrent contracts of service"—Ejusdem generis - - - - **53**
See EMPLOYER AND WORKMAN. 4.

RAILWAY AND CANAL TRAFFIC ACT, 1888, s. 33, sub-s. 5 - - - - 192
See RAILWAY. 2.

RATES—*Exemption — City of London—Land reclaimed from the Thames—"Free from all taxes and assessments whatsoever"—Poor Rate—County Rate—Education Expenses—Equalisation Charge—7 Geo. 3, c. 37, s. 51—County Rates Act*, 1852 (15 *&* 16 *Vict. c.* 81), *s.* 26—*Local Government Act*, 1888 (51 *&* 52 *Vict. c.* 41), *s.* 68—*London* (*Equalisation of Rates*) *Act*, 1894 (57 *&* 58 *Vict. c.* 53), *s.* 1, *sub-s.* 5 (*b*)—*Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *s.* 18.

By s. 51 of 7 Geo. 3, c. 37, it was provided that certain lands reclaimed from the river Thames should vest in the adjoining owners "free from all taxes and assessments whatsoever."

The education expenses under the Education Act, 1902, the equalisation charge under s. 1, sub-s. 5 (*b*), of the London (Equalisation of Rates) Act, 1894, and the sums required to be raised by the county council under s. 68, sub-ss. 4 and 5, of the Local Government Act, 1888, are payable by county contributions which are levied by means of county rates made according to the provisions of s. 26 of the County Rates Act, 1852. By that section precepts for the levy of the money required to be raised by a county rate are directed by county councils to the guardians of the poor, who raise the money required by such precepts in like manner as the money required by the guardians for the relief of the poor, that is to say, by contribution orders addressed to the overseers of parishes who pay the money out of the poor rates collected by them.

Precepts or contribution orders were addressed by the London County Council to the respondents, who were the overseers of the parish of the city of London within which the reclaimed lands were situate, for the payment of the sums required to be levied in the parish of the city of London for the abovementioned purposes, and the respondents paid such sums out of the proceeds of the poor rate levied by them in the parish, and the appellants, as the occupiers of hereditaments within the reclaimed area, were rated to so much of the poor rate as included the sums of money required to meet the precepts of the London County Council:—

Held, that as the exemption in s. 51 of 7 Geo. 3, c. 37, applied to then existing taxes and assessments or others substituted for them: *Sion College* v. *London Corporation* [1901] 1 K. B. 617; and as it included the poor rate: *Rex* v. *London Gas Light Co.* (1828) 8 B. & C. 54; it included every part of the poor rate, which was one indivisible rate, and the exemption therefore covered the education charge, the equalisation charge, and the other sums above mentioned, which were charged upon and made payable out of the poor rate; and that the appellants were therefore exempt.

Decision of the Divisional Court [1913] 2 K. B. 281, reversed.

Quære, whether *Sion College* v. *London Corporation* [1901] 1 K. B. 617 is still a binding authority having regard to the observations of Lord Davey in *London Corporation* v. *Netherlands Steamboat Co.* [1906] A. C. 263, at p. 271. ASSOCIATED NEWSPAPERS, LIMITED *v.* CITY OF LONDON CORPORATION **C. A. 603**

2. —— *Exemption from Taxes and Assessments—City of London — General Rate—Consolidated Rate—Police Rate—7 Geo. 3, c. 37, s. 51—City of London Police Act*, 1839 (2 *&* 3 *Vict. c. xciv.*)—*City of London Sewers Act*, 1848 (11 *&* 12 *Vict. c. clxiii.*) — *City of London* (*Central Criminal Court House*) *Act*, 1904 (4 *Edw.* 7, *c. xciii.*)—*City of London* (*Union of Parishes*) *Act*, 1907 (7 *Edw.* 7, *c. cxl.*).

By s. 51 of the statute 7 Geo. 3, c. 37, it was provided that certain lands reclaimed from the river Thames should vest in the adjoining owners "free from all taxes and assessments whatsoever."

Before the passing of that Act there had been passed an Act of 10 Geo. 2, c. 22, for better regulating the nightly watch and beadles within the city of London, which required the Corporation of that City to appoint watchmen and beadles for each of the City wards, and to give directions as to their arming, duties, and wages; and to order and direct the attendance of constables every night at each ward; and for the better raising and levying of moneys for paying the wages of the watchmen and beadles and other charges incident thereto, to direct the aldermen and common councilmen of each ward to make an equal rate and assessment upon all persons who should inhabit, hold, occupy, or enjoy any land, house, shop, warehouse, or other tenement within their respective wards.

Before the City of London Police Act, 1839, was passed there were acting within the City night watchmen paid out of the watch rate, 120 policemen paid out of the City's cash and not out of rates, and constables chosen from the wards and not paid.

The City of London Police Act, 1839, was passed to repeal the Act of 10 Geo. 2, c. 22, in order to render still more effective a certain system of police established instead of a nightly watch. By s. 58 it was enacted that a just and equal pound rate should be made upon every person who should inhabit any house within the several wards or within any precinct or place within the boundaries of such wards or adjoining thereto whether such person should then be liable in respect of such house to be assessed to the relief of the poor, or should not be liable to be assessed to the relief of the poor in respect thereof by reason of such house being situated in any precinct or extra-parochial place.

Both before and after the statute of 7 Geo. 3, c. 37, numerous Acts had been passed relating to the paving, cleansing, and lighting of streets in the city of London.

By s. 168 of the City of London Sewers Act, 1848, there was established a rate to be called the consolidated rate for making, maintaining, keeping in repair, paving, lighting,

RATES—*continued.*

sweeping, cleansing, and watering the streets, and for making improvements and constructing, altering, repairing, and cleansing the sewers within the City, and for otherwise maintaining effectually the wholesome sewerage and drainage of the City, defraying wages and all other incidental costs and expenses attending the execution of the powers thereby given. By s. 169 of the Act the rate was to be made upon every person who should inhabit, hold, occupy, possess, or enjoy any house or building within the City whether such person should then be liable in respect of such house or building to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of any such house or building being situated in any precinct or extra-parochial place or otherwise.

By the City of London (Union of Parishes) Act, 1907, s. 15, certain rates including the police rate and the consolidated rate were to be assessed, made, levied, and collected as one rate to be termed the general rate.

In a general rate made by the respondents as overseers of the parish of the city of London, the appellants, who were occupiers of land and hereditaments reclaimed under the statute 7 Geo. 3, c. 37, as aforesaid, were rated thereto in respect of those lands. The general rate was made for (1.) expenses of paving, cleansing, lighting, improvements, and sanitary charges, and (2.) expenses in respect of police. It being admitted for the purposes of this case that the general rate might be analysed into its component parts:—

Held, as to so much of the rate as was made for the expenses of paving, cleaning, lighting, &c., that the appellants were liable: *Sion College* v. *London Corporation* [1901] 1 K. B. 617 followed.

But *held*, as to so much of the rate as was made for expenses in respect of police, that, this being a rate for purposes existing at the date of the statute 7 Geo. 3, c. 37, the premises in question were exempted and the appellants were not liable. ASSOCIATED NEWSPAPERS, LIMITED *v.* CITY OF LONDON CORPORATION (No. 2) - - - - Div. Ct. 822

—— Church rate.
See under ECCLESIASTICAL LAW.

—— Railway company—Carriers - - 192
See RAILWAY. 2.

RECEIVER — Appointment of — Execution — Practice—Equitable execution - 183
See EXECUTION.

—— Bankruptcy—Mortgage of book debts—Notice of assignment—Bankruptcy of mortgagor — Order and disposition — Consent of true owner—Debts due or growing due - - - - 910
See BANKRUPTCY. 6.

REDEMPTION — Workmen's compensation — Weekly payments — Review—Application by employer—Diminution and/or redemption—Withdrawal of application as to redemption - - - - 36
See EMPLOYER AND WORKMAN. 10.

REGISTRATION — Bankruptcy — Deed of arrangement — Non-registration — Assignment for benefit of scheduled creditors - - - - - 77
See BANKRUPTCY. 3.

—— Money-lender—Security taken by—Registered name - - - - - 1
See MONEY-LENDER. 1.

REINSTATE—Appeal from county court—Non-appearance of respondent—Motion to reinstate—Jurisdiction of High Court
See PRACTICE. 1. 421

REMAINDERMAN—Tenant for life and—Will—Deer in a park—Consumable things—Validity of gift over - - - 486
See WILL.

REMITTED ACTION—Refusal of judge to try—"Court convenient thereto"—Duty of county court judge - - - 588
See COUNTY COURT. 3.

RENEWAL—Licence—Licensing Acts.
See under LICENSING ACTS.

RENT — Distress — Exemptions — Goods of stranger—"Goods comprised in hire-purchase agreement" - - - 132
See DISTRESS.

—— Landlord and tenant—Claim by tenant against lessor for damages for breach of contract—Action by mortgagees in possession for rent—Right of tenant to set off damages claimed by lessor 284
See LANDLORD AND TENANT. 5.

—— Surrender of tenancy—Tenant remaining in possession — Execution — Claim by landlord for rent - - - - 469
See LANDLORD AND TENANT. 6.

REPAIRS—Landlord and tenant—Covenant to repair—Notice of breach—Sufficiency of notice - - - - - 109
See LANDLORD AND TENANT. 4.

—— Lease — Repairing covenant — Death of assignee intestate—Executor de son tort—Liability - - - - 562
See LANDLORD AND TENANT. 3.

REPUTATION—Damage to—Malicious prosecution — Damage necessary to support action for— Summary proceedings to compel abatement of a nuisance - 5
See MALICIOUS PROSECUTION.

RESCISSION — Contract — Fraud — Concealed fraud—Limitation Act, 1623, s. 3 139
See LIMITATION, STATUTE OF.

RETAINER—Solicitor and client—Retainer to conduct action — Authority to compromise after judgment - - 758
See SOLICITOR. 3.

RETROSPECTIVE AWARD—Workmen's compensation—Infant workman—Weekly payments—Application to review 30
See EMPLOYER AND WORKMAN. 7.

REVENUE—*Income Tax—Expenses of Paving Street—Interest thereon—Deduction of Income Tax—" Yearly interest of money"—Gateshead Improvement Act*, 1867 (30 & 31 *Vict. c. lxxxiii.*), *s.* 32—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 40.

The plaintiffs, as the urban authority of a borough, had under s. 150 of the Public Health Act, 1875, and the Gateshead Improvement Act, 1867, some years before action brought paved and made up certain streets, and had from time to time apportioned the expenses thereof among the owners of the premises fronting thereon. The defendant was the owner of premises in these streets, and the plaintiffs, under the power conferred upon them by s. 32 of the Gateshead Improvement Act, 1867, allowed him time for the repayment of the sums apportioned in respect of his premises, interest being payable thereon at the rate of 5 per cent. per annum. The defendant paid to the plaintiffs varying sums at irregular intervals in part payment of the amount due, which the plaintiffs credited in the first place to the interest due and in the second place towards payment of the principal. There was no evidence to shew that the plaintiffs made a regular practice of allowing these expenses to remain unpaid, bearing interest, as a mode of investing their funds. The defendant claimed, upon paying off the final amount due for principal and interest, to be entitled to deduct the income tax upon the amount due for interest as being " yearly interest of money " within s. 40 of the Income Tax Act, 1853 :—

Held, that the interest did not come within the words " yearly interest of money " in s. 40, and that therefore the defendant was not entitled to deduct income tax therefrom. GATESHEAD CORPORATION *v.* LUMSDEN **C. A. 883**

2. —— *Income Tax—Foreign Possessions—Property settled on Infants—Infants not entitled to a Vested Interest—Provision for Maintenance and Education—" Uncontrolled Discretion" of Trustees—Sums remitted to Guardian in United Kingdom for Maintenance and Education—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 41; *s.* 100, *Case* 5—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sched. D.*

A foreigner resident abroad by his will gave his property, which was situate abroad, to trustees upon trust for the benefit of his deceased son's children, who were minors, for life, and their issue after them, there being a provision that the trustees should accumulate the income of the respective shares of the children and add the accumulations to capital until each child should attain the age of twenty-five years, when, and not before, the child was to become entitled to a portion of the accumulated fund. The will contained a direction to the trustees, " out of the net income of the proportionate share of the trust estate held in trust for any child," to make such provision from time to time as they in their uncontrolled discretion might think necessary or advisable for the suitable maintenance and education of such child. The trustees from time to time remitted to the mother of the children, who was their guardian and who was residing with them in England, sums of money in accordance with the provisions of the will for the maintenance and education of the children :—

Held by the Court of Appeal (Cozens-Hardy M.R. and Sir S. Evans P., Joyce J. dissenting), that the moneys so remitted were assessable to income tax under s. 100, case 5, of the Income Tax Act, 1842, Sched. D, as being moneys received in this country in respect of foreign possessions.

Decision of Horridge J. [1913] 3 K. B. 583 affirmed. DRUMMOND *v.* COLLINS (SURVEYOR OF TAXES) - - - - **C. A. 643**

3. —— *Income Tax—Profits of Trade—" Fair and just average"—Deductions—Land owned by Trader—Exclusive User for Purposes of Trade—Annual Value—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, Case I.*, *r.* 1; *Cases I. and II.*, *r.* 1—*Finance Act*, 1898 (61 & 62 *Vict. c.* 10), *s.* 9.

A company carrying on a business owned certain lands which were used exclusively for the purposes of the business. In an assessment made on the company under Sched. D of the Income Tax Acts for the year ending April 5, 1912, the annual value of the lands as represented by the Sched. A assessment in each of the three previous years was deducted from the profits of each of the said years before striking the average. The amount assessed under Sched. A for the year of assessment was larger than in the previous years, and the company claimed that the average profits for the three previous years should be ascertained without the deduction of the amount of the Sched. A assessment in each of the years, and that from the amount of the average profits thus ascertained the amount of the Sched. A assessment for the year of assessment should be deducted :—

Held, that the contention of the company was erroneous and that the assessment had been made upon the right principle.

Russell v. *Town and County Bank* (1888) 13 App. Cas. 418 followed and applied. GENERAL HYDRAULIC POWER COMPANY, LIMITED *v.* HANCOCK - - **Scrutton J. 21**

4. —— *Income Tax—Sched. D—Balance of Profits and Gains—Deductions—Brewery Business—Tied Houses—Repairs—Insurance Premiums—Loss on Rents—Legal Expenses—Income Tax Act*, 1842 (5 & *Vict. c.* 35), *s.* 100—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2.

A brewery company, solely for the purposes and as part of their brewery business and as a necessary incident of the profitable working thereof, were the owners of licensed houses which they let to " tied " tenants, who, in consideration of the tie, paid a rent less than the full annual value. These premises were not acquired or held as investments by the company. The tenants were under agreement to repair and to pay rates and taxes, but the company in fact did the repairs and paid the

REVENUE—*continued.*

rates and taxes as a matter of commercial expediency and in order to avoid loss of tenants. The company also in respect of these houses paid premiums on insurances against fire and loss of licences, and incurred certain legal expenses in connection with the renewal of the licences and other matters which did not relate to any extension of the business. In estimating the balance of the profits and gains of their business for the purposes of assessment to income tax, the company claimed to deduct their expenditure in respect of all the above matters:—

Held by the Court of Appeal, (1.), affirming the decision of Horridge J. [1914] 1 K. B. 357, that the deduction in respect of repairs to tied houses could not be allowed; and (2.), reversing the decision of Horridge J., that the deductions in respect of all the other items could not be allowed as expenses necessarily incurred for the purpose of earning the profits, and wholly and exclusively for the purposes of the trade.

Brickwood & Co. v. *Reynolds* [1898] 1 Q. B. 95 is not inconsistent with or overruled by *Smith* v. *Lion Brewery Co.* [1911] A. C. 150.

The latter case considered and explained. USHER'S WILTSHIRE BREWERY, LIMITED *v.* BRUCE - - - - - - **C. A. 891**

5. —— *Land Values—Provisional Valuation — Appeal from Referee — Order to pay "Expenses"—Unascertained Amount—Rule of Court—Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 33, *sub-s.* 3.

By s. 33, sub-s. 1, of the Finance (1909-10) Act, 1910, any person aggrieved may appeal against a determination by the Commissioners of Inland Revenue of the total value or site value of any land. By sub-s. 2 the appeal is to be referred to a referee. By sub-s. 3 the referee is to determine any matter referred to him in consultation with the Commissioners and the appellant, and may order that any expenses incurred by the Commissioners be paid by the appellant; and "any order of a referee as to expenses may be made a rule of Court."

On the hearing of an appeal under this enactment the referee made an order in the following terms:—"I order that any expenses incurred by the Commissioners be paid by the appellant."

On a motion to make this award a rule of Court:—

Held, that the award was void for uncertainty and could not be made a rule of Court. SIMPSON *v.* INLAND REVENUE COMMISSIONERS **Scrutton J. 842**

6. —— *Licensed Premises—Lease—Increase of Licence Duty—Increased Rent due to Licence—Proportion of Increase in Duty recoverable from Lessor—Finance Act*, 1912 (2 & 3 *Geo.* 5, *c.* 8), *s.* 2.

Sect. 2 of the Finance Act, 1912, provides that in the case of licensed premises which are not "tied," and which are held under a lease made before the Finance (1909-10) Act, 1910, the lessee shall be entitled to recover from the lessor so much of the increase in licence duty payable under the Act of 1910 as is "proportionate to any increased rent . . . . payable in respect of the premises being let as licensed premises":—

Held, that, in order to ascertain for the purposes of the above section whether any increased rent is payable in respect of premises being let as licensed premises, the question to be considered is, what rent could be obtained for the premises as they stand but without a licence, and that it is not material to inquire what rent might be obtained if as a result of extensive structural alterations the licensed premises were converted into premises of a totally different character. PROCTER *v.* TARRY **Div. Ct. 178**

7. —— *Stamp Duty— Agreement — Sale of Business — Debts owing by Persons resident Abroad — "Property locally situate out of the United Kingdom"—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-s.* 1.

An agreement was made and executed in England for the sale of a business carried on at Buenos Aires in Argentina and its assets. The assets of the business included certain book debts owing by persons resident in Argentina to the vendor of the business:—

Held, that the book debts were not property "locally situate out of the United Kingdom" within the meaning of the exception in s. 59, sub-s. 1, of the Stamp Act, 1891, and that an ad valorem duty was, therefore, payable on the apportioned consideration for the sale of the book debts.

The decisions of the Court of Appeal in *Smelting Co. of Australia* v. *Inland Revenue Commissioners* [1897] 1 Q. B. 175 and *Danubian Sugar Factories* v. *Inland Revenue Commissioners* [1901] 1 K. B. 245 have not been overruled by *Inland Revenue Commissioners* v. *Muller & Co.'s Margarine* [1901] A. C. 217. VELAZQUEZ, LIMITED *v.* INLAND REVENUE COMMISSIONERS - - - **Scrutton J. 404**

8. —— *Undeveloped Land Duty—"Dwelling-house"—Land "developed by erection of dwelling-houses"—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 16, 17.

Sect. 16, sub-s. 1, of the Finance (1909-10) Act, 1910, provides that "Subject to the provisions of this Part of this Act, there shall be charged, levied, and paid for the financial year ending the thirty-first day of March nineteen hundred and ten, and every subsequent financial year in respect of the site value of undeveloped land a duty, called undeveloped land duty, at the rate of one halfpenny for every twenty shillings of that site value."

Sub-s. 2: "For the purposes of this Part of this Act, land shall be deemed to be undeveloped land if it has not been developed by the erection of dwelling-houses."

Sect. 17, sub-s. 4: "Undeveloped land duty shall not be charged on the site value of any land not exceeding an acre in extent

REVENUE—*continued.*

occupied together with a dwelling-house . . . ."

Held, (1.) that in the above-mentioned sections the word "dwelling-house" means a house, outbuildings, curtilage, and the open spaces included therein other than gardens or pleasure grounds; (2.) that a courtyard of a house (partly used for the purposes of a stable yard, partly as an approach to the kitchens and domestic offices, and the remainder for all the usual purposes to which a courtyard can be put) is included in the "curtilage" and is therefore not liable to undeveloped land duty under s. 16 of the Act; (3.) that so much land is "developed" within the meaning of s. 16 by the erection of a dwelling-house as is essential to its use as a dwelling-house by the class of persons who might, from the business point of view of a person dealing in houses, be expected to live in it, and the site of the house together with such an amount of adjoining land as complies with that description is "developed" by the erection of the house.

Sub-s. 4 of s. 17 does not mean that an acre of land in addition to that which is developed by the erection of a dwelling-house is to be free from undeveloped land duty. The subsection means that an acre of the land which is occupied with a dwelling-house shall always be free of undeveloped land duty whether it includes developed or undeveloped land, thus giving the subject one acre of land free from the duty in addition to the site of his house (including the curtilage), while the sub-section does not prevent him, if more land than an acre is essential to the enjoyment of the house, from claiming that the excess over the acre is also free from the duty as developed land. INLAND REVENUE COMMISSIONERS *v.* DUKE OF DEVONSHIRE - - - - - - **Scrutton J. 627**

9. —— *Undeveloped Land Duty—Person chargeable—Owner for the Time being—Purchaser in Possession before Execution of Conveyance—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 19, 33, 41.

By s. 19 of the Finance (1909-10) Act, 1910, "undeveloped land duty shall be assessed" by the Commissioners of Inland Revenue "and shall be recoverable from the owner of the land for the time being." By s. 41 "the expression 'owner' means the person entitled in possession to the rents and profits of the land in virtue of any estate of freehold."

A., whose business was that of a land developer, bought some land and cut it up into plots, which were purchased by different persons under agreements which provided for the payment of the purchase price by instalments and for the execution of conveyances on the completion of the payments. The Commissioners made an assessment upon A. for undeveloped land duty in respect of these plots of land. At the date of the assessment the purchasers were in possession of their respective plots, but not having completed their payments had not received their conveyances. A. appealed to a referee against the assessment on the ground that he was not the owner of the plots of land and was, therefore, not liable to pay the duty. The referee by his award declared that A. was the owner and was liable. From this decision A. appealed to the High Court:—

Held by the Court of Appeal, affirming the decision of Scrutton J. [1914] 1 K. B. 327, that the purchasers, and not A., were the owners of the plots of land within s. 41 of the Act, and that the assessment had, therefore, been wrongly made upon A. ALLEN *v.* INLAND REVENUE COMMISSIONERS - - **C. A. 327**

—— Inhabited house duty—Lease—Covenant by lessee—"Assessments charged on the premises"—Landlord assessed by mistake—Payment by landlord—Implied request.
See LANDLORD AND TENANT. 2. **361**

—— Licensing Acts.
See under LICENSING ACTS.

REVOCATION — Appointment of managing director—Power to revoke appointment
See COMPANY. **770**

RIVER — *Pollution — Polluting Liquid — Sewer vested in Local Sanitary Authority—Proceedings against Sanitary Authority—Local Government—Public Health—Rivers Pollution Prevention Act*, 1876 (39 *&* 40 *Vict. c.* 75), *ss.* 4, 6.

Proceedings cannot be taken against a local sanitary authority under s. 4 of the Rivers Pollution Prevention Act, 1876, for causing or permitting polluting liquid proceeding from a factory or manufacturing process to fall or flow or be carried into a stream. WEST RIDING OF YORKSHIRE RIVERS BOARD *v.* LINTHWAITE URBAN DISTRICT COUNCIL - - **Div. Ct. 13**

RIVERS POLLUTION PREVENTION ACT, 1876, ss. 4, 6 - - - - - - - **13**
See RIVER.

RULES OF THE SUPREME COURT, 1883, Order XI., r. 1 (g) — *Service out of the jurisdiction* - - - - - **747**
See PRACTICE. 4.

—— Order XVI., r. 4—*Parties* - - - **747**
See PRACTICE. 4.

—— —— r. 9 - - - - - - **930**
See PRACTICE. 3.

—— Order XXVIII., r. 11—*Amendment* - **734**
See JUDGMENT.

—— Order XXXVI., r. 33—*Trial* - - **421**
See PRACTICE. 1.

—— —— r. 39 - - - - - - **429**
See PRACTICE. 2.

—— Order LVII., r. 1 (a)—*Interpleader* - **545**
See INTERPLEADER.

—— Order LVIII., r. 4—*Appeals to the Court of Appeal* - - - - - - **429**
See PRACTICE. 2.

—— Order LIX., r. 16—*Divisional Courts* - **421**
See PRACTICE. 1.

SAILOR—Workmen's compensation—Return to ship—Ashore to buy provisions—Agreement by crew to find their own provisions—Ship's business - - 39
See EMPLOYER AND WORKMAN. 9.

SALE—Stamp duty—Agreement—Sale of business—Debts owing by persons resident abroad - - - - - - 404
See REVENUE. 7.

SALVAGE—Passage money—Disbursements—Loss — Subsequent earning of other passage money - - - - 682
See INSURANCE (MARINE).

SANITARY AUTHORITY — London—Highway—Sewer—Defective gully—Negligence—Nonfeasance—Misfeasance - 89
See LONDON. 2.

—— River — Pollution — Sewer vested in local sanitary authority—Proceedings against sanitary authority - - - 13
See RIVER.

—— Sewage flowing into Little Creek—Part of or tributary of the Thames—"Caused or suffered" - - - - 916
See LOCAL GOVERNMENT. 3.

SCHOOLS — London — Building notice — New buildings—Public elementary school—Alterations - - - - - 803
See LONDON. 1.

SEAMAN—Employment on fishing boat—Discharge—Dispute—Submission to deputy superintendent of a mercantile marine office—Jurisdiction - - - 455
See SHIPPING.

SEDUCTION—*Master and Servant—Wife living with her Husband—Seduction of Wife's Adopted Daughter — Household Services rendered by Adopted Daughter—Pocket-Money and Clothes for Adopted Daughter provided out of Husband's Money—Whether Action will lie at Suit of Wife.*

The principle on which an action for seduction is maintainable is not that there must be the relationship, or any quasi-relationship, of parent and child. The necessary and sufficient relation is that of master and servant.

An action was brought to recover damages for the seduction of a girl aged twenty-two, the adopted daughter of the plaintiff, a married woman. The plaintiff lived with her husband. The girl lived in the house with the plaintiff and her husband, and without any specific contract of service either with the plaintiff or her husband performed there the ordinary domestic services of the household. She was given by the plaintiff about 5*s.* a week for pocket-money. Her clothes also were provided for her. The clothes and pocket-money were provided out of the husband's money. At the trial evidence of the facts stated above was given, and that the defendant had seduced the girl. The plaintiff had no separate estate:—

Held, that the action would not lie at the suit of the plaintiff. The legal relationship of father and child did not by itself justify the maintenance of the action, which could be justified only by the legal fiction to which that relationship gave rise, namely, that a child living with the parent was a servant; and while the wife was living with her husband any ordinary domestic servant employed in the house was the servant of the husband and not of his wife.

Hamilton v. *Long* [1903] 2 I. R. 407; [1905] 2 I. R. 552, approved of.
PETERS *v.* JONES - - - **Avory J. 781**

SERVANT—Master and.
See under MASTER AND SERVANT.

SERVICE—Contract of.
See under CONTRACT OF SERVICE.

—— Parties—Joinder of defendants—Separate causes of action—Service out of jurisdiction—"Necessary or proper party"
See PRACTICE. 4. 747

SET-OFF — Landlord and tenant — Claim by tenant against lessor for damages for breach of contract—Action by mortgagees in possession for rent—Right of tenant to set off damages claimed from lessor - - - - - - - 284
See LANDLORD AND TENANT. 5.

SEWAGE—Sanitary authority—Sewage flowing into Little Creek—Part or tributary of the Thames - - - - - 916
See LOCAL GOVERNMENT. 3.

SEWER — London—Sanitary authority—Highway — Defective gully — Negligence—Nonfeasance—Misfeasance - - 89
See LONDON. 2.

—— River—Pollution—Sewer vested in local sanitary authority — Public health—Proceedings against sanitary authority
See RIVER. 13

SHERIFF—Execution—Withdrawal of sheriff—"Completion of execution" - 70
See BANKRUPTCY. 5.

SHIPPING—*Seaman — Employment on Fishing Boat — Discharge — Dispute — Submission to Deputy Superintendent of a Mercantile Marine Office—Jurisdiction—Merchant Shipping Act,* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 247, *sub-s.* 2; *s.* 387 *sub-s.* 1.

Sect. 387, sub-s. 1, of the Merchant Shipping Act, 1894, provides that a superintendent of a mercantile marine office shall inquire into, hear, and determine any dispute between the owner of a fishing boat and any seaman of the boat concerning, inter alia, the seaman's discharge, if any party to the dispute calls on him to decide it.

Sect. 247, sub-s. 2, provides that any act done by a deputy duly appointed shall have

SHIPPING—*continued.*

the same effect as if done by a superintendent :—

Held, that a deputy superintendent has power to adjudicate upon disputes under s. 387. MAYHEW *v.* TRIPP - Div. Ct. 455

—— Dock—Contract for use of — Unfitness of equipment of dock—Exemption clause in general words — Damage to ship—Liability of dock owner - - 788
See DOCK.

—— Sailor—Workmen's compensation—Return to ship — Ashore to buy provisions — Agreement by crew to find their own provisions—Ship's business - 39
See EMPLOYER AND WORKMAN. 9.

SHOPS—*Weekly Half-holiday—Different days for different Trades—Article sold in more than one Trade—Shops Act,* 1912 (2 *Geo.* 5, *c.* 3), *s.* 4.

Where a commodity is sold by retail in the ordinary course of the business of more than one class of traders, and the weekly half-holiday under the Shops Act, 1912, is fixed by the local authority for the different classes respectively on different days of the week, a trader who sells the commodity in the ordinary course of his own business is not required to close his shop for the serving of customers with it on the half-holiday fixed for any of the other classes of traders. SCHUCK *v.* BANKS - - - - - Div. Ct. 491

SHORTHAND NOTES—Solicitor — Bill of costs —Solicitor and client—Taxation - 529
See SOLICITOR. 1.

SOLICITOR—*Bill of Costs—Shorthand Notes—Solicitor and Client—Taxation.*

An insurance on goods against fire was effected with three insurance companies. A fire occurred and a claim was made in respect thereof which was referred to arbitration. One of the companies (called the leading company) was entrusted with the conduct of the defence on behalf of all the companies. At the commencement of the arbitration it was agreed between counsel and solicitors on both sides that one shorthand writer should be employed to take a note of the proceedings, the expense to be shared equally by both parties, and that a transcript should be supplied day by day to the arbitrator, who said that it "is in most cases very desirable ; it shortens the case." There was no agreement or order by the arbitrator that the costs of the shorthand notes should be costs in the cause, nor were the clients told that the costs might not be allowed on taxation as between party and party. The case lasted several days and a number of expert witnesses were called, and an award was made in favour of the claimants with costs. Upon taxation as between party and party the claimants' share of the costs of the shorthand notes was disallowed. Upon taxation as between solicitor and client of the insurance companies' solicitors' bill of costs the taxing Master disallowed the costs which the solicitors had paid of one-half of the shorthand notes :—

Held by Buckley and Kennedy L.JJ., Vaughan Williams L.J. dissenting, that these costs were properly disallowed. *In re* RONEY & CO., SOLICITORS - - - C. A. 529

2.—— *Illegal Agreement—Permitting Name to be used for Profit of Unqualified Person—Solicitors Act,* 1843 (6 *&* 7 *Vict. c.* 73), *s.* 32.

There is nothing illegal in a solicitor's clerk being employed upon the terms that he shall receive a share of the profits of business introduced by him to the solicitor.

Sect. 32 of the Solicitors Act, 1843, provides that "if any attorney or solicitor shall wilfully and knowingly . . . . permit or suffer his name to be anyways made use of in any . . . . action, suit, or matter upon the account or for the profit of any unqualified person . . . . knowing such person not to be duly qualified . . . . every such attorney or solicitor so offending shall and may be struck off the roll, and for ever after disabled from practising as an attorney or solicitor . . . ."

By the first clause of an agreement entered into between a solicitor and an unqualified person the solicitor agreed to engage the unqualified person as his managing clerk, and to pay him a salary of 3*l.* 10*s.* per week, and in addition a bonus of 25 per cent. on all gross costs and other profits (exclusive of all disbursements) received by the solicitor on all business introduced by the unqualified person either directly or indirectly. Clause 3 provided that in the event of the determination of the engagement the bonus of 25 per cent. was to be continued to be paid, notwithstanding such determination, less 3*l.* 10*s.* per week :—

Held, that although the agreement would have been valid if it had contained the first clause only, it was rendered invalid by reason of the third clause inasmuch as that clause shewed that the business which was the subject of the agreement was the business of the clerk which was to be carried on in the name of the solicitor for the clerk's profit, and the agreement was therefore illegal under the words in s. 32 of the Solicitors Act, 1843, which prohibit a solicitor from permitting his name to be used in any matter for the profit of an unqualified person. HARPER *v.* EYJOLFSSON Div. Ct. 411

3. —— *Retainer to conduct Action—Solicitor and Client—Authority to compromise after Judgment—Assent to Assignment by Defendant for Benefit of Creditors.*

A retainer to a solicitor to conduct an action does not include an authority to compromise it after judgment by assenting to the execution by the defendant of a deed of assignment of his property to a trustee for the benefit of his creditors. *In re* A DEBTOR (NO. 1 OF 1914). *Ex parte* THE DEBTOR *v.* PETITIONING CREDITOR - - - - Div. Ct. 758

STAMP DUTY—Agreement—Sale of business—Debts owing by persons resident abroad—"Property locally situate out of the United Kingdom" - - - 404
See REVENUE. 7.

STATION YARD — Railway company — Negligence—Duty towards invitees—Open culvert—Horse and cart unattended—Contributory negligence - - 153
See RAILWAY. 1.

STATUTES :—

1571.

13 Eliz. c. 5 - - - - - - - 694
See BANKRUPTCY. 4.

1623.

21 Jac. 1, c. 16, s. 3—*Limitation* - - 139
See LIMITATION, STATUTE OF.

1709.

8 Anne, c. 14, ss. 1, 6, 7 - - - - - 469
See LANDLORD AND TENANT. 6.

1766.

7 Geo. 3, c. 37, s. 51 - - - 603, 822
See RATES. 1, 2.

1774.

14 Geo. 3, c. 78, s. 83—*Fires Prevention (Metropolis)* - - - - - . - 545
See INTERPLEADER.

1822.

3 Geo. 4, c. 114—*Hard Labour* - - 107
See CRIMINAL LAW. 1.

1823.

4 Geo. 4, c. 60, s. 41—*Lotteries* - - 868
See LOTTERY.

1839.

2 & 3 Vict. c. xciv.—*London Police* - 822
See RATES. 2.

1842.

5 & 6 Vict. c. 35, s. 41; s. 100, case 5—*Income Tax* - - - - - - 643
See REVENUE. 2.

—— —— s. 100 - - - - - - 891
See REVENUE. 4.

—— —— s. 100, Sched. D., case I., r. 1; cases I. and II., r. 1 - - - 21
See REVENUE. 3.

1843.

6 & 7 Vict. c. 73, s. 32—*Solicitors* - - 411
See SOLICITOR. 2.

1846.

9 & 10 Vict. c. 93—*Fatal Accidents* - 61
See EMPLOYER AND WORKMAN. 5.

1848.

11 & 12 Vict. c. clxiii.—*City of London Sewers*
See RATES. 2. 822

STATUTES—*continued.*

1852.

15 & 16 Vict. c. 81, s. 26—*County Rates* - 603
See RATES. 1.

1853.

16 & 17 Vict. c. 34, s. 2—*Income Tax* - 891
See REVENUE. 4.

—— —— s. 2, Sched. D. - - - 643
See REVENUE. 2.

—— —— s. 40 - - - . - - 883
See REVENUE. 1.

16 & 17 Vict. c. 119, s. 1—*Betting* - - 817
See GAMING.

1855.

18 & 19 Vict. c. 120, ss. 68, 69, 96—*Metropolis Management* - - - - 89
See LONDON. 2.

1861.

24 & 25 Vict. c. 96, s. 4—*Larceny* - - 378
See CRIMINAL LAW. 2.

1867.

30 & 31 Vict. c. lxxxiii., s. 32—*Gateshead Improvement* - - - - 883
See REVENUE. 1.

1868.

31 & 32 Vict. c. 109, ss. 1, 2, 5, 10—*Compulsory Church Rate Abolition* - - 660
See ECCLESIASTICAL LAW.

1873.

36 & 37 Vict. c. 66, s. 25, sub-s. 8—*Supreme Court of Judicature* - - - 183
See EXECUTION.

1875.

38 & 39 Vict. c. 55, s. 95—*Public Health* 5
See MALICIOUS PROSECUTION.

—— —— ss. 150, 257 - - - - 883
See REVENUE. 1.

1876.

39 & 40 Vict. c. 75, ss. 4, 6—*Rivers Pollution Prevention* - - - - - 13
See RIVER.

1881.

44 & 45 Vict. c. 41, s. 14, sub-s. 1—*Conveyancing and Law of Property* - 109
See LANDLORD AND TENANT. 4.

1883.

46 & 47 Vict. c. 52, s. 4, sub-s. 1 (*b*)—*Bankruptcy* - - - - - - 694
See BANKRUPTCY. 4.

—— —— s. 22, sub-s. 9; s. 57, sub-s. 3; s. 73, sub-s. 3; ss. 89, 90 - - - 701
See BANKRUPTCY. 7.

—— —— s. 44, sub-s. 2 (iii.) - - - 910
See BANKRUPTCY. 6.

—— —— s. 45 - - - - - - 70
See BANKRUPTCY. 5.

STATUTES—*continued.*

1887.

50 & 51 Vict. c. 17, s. 4—*Metropolis Management (Battersea and Westminster)* 89
See LONDON. 2.

50 & 51 Vict. c. 57, s. 4, sub-s. 2; s. 19—*Deeds of Arrangement* - - - - 77
See BANKRUPTCY. 3.

1888.

51 & 52 Vict. c. 25, s. 33, sub-s. 5—*Railway and Canal Traffic* - - - 192
See RAILWAY. 2.

51 & 52 Vict. c. 41, s. 32, sub-s. 3 (*b*)—*Local Government* - - - - 847
See LOCAL GOVERNMENT. 1.

—— —— s. 68 - - - - - 603
See RATES. 1.

51 & 52 Vict. c. 43, s. 65—*County Courts* 588
See COUNTY COURT. 3.

—— —— s. 93 - - - - - 448
See COUNTY COURT. 1.

—— —— s. 160 - - - - - 469
See LANDLORD AND TENANT. 6.

1890.

53 & 54 Vict. c. 71, s. 11—*Bankruptcy* - 70
See BANKRUPTCY. 5.

—— —— s. 15, sub-s. 3 - - - 701
See BANKRUPTCY. 7.

1891.

54 & 55 Vict. c. 39, s. 59, sub-s. 1—*Stamp* 404
See REVENUE. 7.

1894.

57 & 58 Vict. c. 53, s. 1, sub-s. 5 (*b*)—*London (Equalisation of Rates)* - - 603
See RATES. 1.

57 & 58 Vict. c. 60, s. 247, sub-s. 2; s. 387, sub-s. 1—*Merchant Shipping* - 455
See SHIPPING.

57 & 58 Vict. c. clxxxvii., ss. 90, 94—*Thames Conservancy* - - - - 916
See LOCAL GOVERNMENT. 3.

57 & 58 Vict. c. ccxiii., s. 145—*London Building* - - - - - - 803
See LONDON. 1.

1898.

61 & 62 Vict. c. 10, s. 9—*Finance* - - 21
See REVENUE. 3.

61 & 62 Vict. c. 39, s. 1—*Vagrancy* - 386
See CRIMINAL LAW. 5.

1899.

62 & 63 Vict. c. 14, s. 4—*London Government* 89
See LONDON. 2.

1900.

63 & 64 Vict. c. 51, s. 1—*Money-lenders* - 372
See MONEY-LENDER. 2.

—— —— s. 2, sub-s. 1 (*c*) - - - 1
See MONEY-LENDER. 1.

STATUTES—*continued.*

1902.

2 Edw. 7, c. 42, s. 18—*Education* - - 603
See RATES. 1.

1903.

3 Edw. 7, c. clxxxi., s. 32—*Willesden Urban District Council* - - - - 85
See LOCAL GOVERNMENT. 2.

1904.

4 Edw. 7, c. xciii.—*City of London (Central Criminal Court House)* - - 822
See RATES. 2.

1906.

6 Edw. 7, c. 58, s. 1—*Workmen's Compensation* 227
See EMPLOYER AND WORKMAN. 1.

—— —— s. 1, sub-s. 1 - - - - 39
See EMPLOYER AND WORKMAN. 9.

—— —— s. 1, sub-s. 2 (*b*) - - - 61
See EMPLOYER AND WORKMAN. 5.

—— —— s. 3 - - - - - 243
See EMPLOYER AND WORKMAN. 3.

—— —— s. 8 - - - - - 213
See EMPLOYER AND WORKMAN. 6.

—— —— Sched. I. (1—3) - - - 291
See EMPLOYER AND WORKMAN. 2.

—— —— Sched. I. (2.) (*b*) - - - 53
See EMPLOYER AND WORKMAN. 4.

—— —— Sched. I. (16.) - - - 30
See EMPLOYER AND WORKMAN. 7.

—— —— Sched. I. (16.), (17.) - - 36
See EMPLOYER AND WORKMAN. 10.

—— —— Sched. II. (4.), (9.), (12.) - 257
See EMPLOYER AND WORKMAN. 8.

1907.

7 Edw. 7, c. 23, s. 4, sub-s. 1—*Criminal Appeal*
See CRIMINAL LAW. 7. 99

7 Edw. 7, c. 53, s. 23—*Public Health Acts Amendment* - - - - - - 798
See BUILDINGS.

7 Edw. 7, c. cxl.—*City of London (Union of Parishes)* - - - - - 822
See RATES. 2.

1908.

8 Edw. 7, c. 28, ss. 13, 30, 43; Sched. II.—*Agricultural Holdings* - - 478
See LANDLORD AND TENANT. 1.

8 Edw. 7, c. 53, s. 4—*Law of Distress Amendment* - - - - - - 132
See DISTRESS.

8 Edw. 7, c. 62, s. 89—*Companies (Consolidation)* - - - - - - 299
See BANKRUPTCY. 2.

8 Edw. 7, c. 67, s. 58, sub-s. 3—*Children* 494
See INFANT.

—— —— ss. 102, 106, 131 - - - 378
See CRIMINAL LAW. 2.

STATUTES—*continued.*

1910.

10 Edw. 7, c. 8, ss. 16, 17—*Finance* (1909-10) - - - - - 627
See REVENUE. 8.

—— —— ss. 19, 33, 41 - - - - - 327
See REVENUE. 9.

—— —— s. 33, sub-s. 3 - - - 842
See REVENUE. 5.

10 Edw. 7 & 1 Geo. 5, c. 24, s. 1; s. 14, sub-s. 1 (*a*)—*Licensing* (*Consolidation*)
See LICENSING ACTS. 3. 390

—— —— s. 14 - - - - - - 335
See LICENSING ACTS. 2.

—— —— s. 19 - - - - - - 710
See LICENSING ACTS. 4.

—— —— Sixth Schedule, Special Provision 2
See LICENSING ACTS. 1. 705

1911.

1 & 2 Geo. 5, c. 32, s. 3—*Education* (*Administrative Provisions*) - - - 803
See LONDON. 1.

1 & 2 Geo. 5, c. 55, ss. 8, 14, 67—*National Insurance* - - - - - 233
See INSURANCE (HEALTH).

—— —— s. 11 - - - - - - 257
See EMPLOYER AND WORKMAN. 8.

—— —— s. 67 - - - - - - 352
See COUNTY COURT. 2.

1912.

2 Geo. 5, c. 2—*Coal Mines* (*Minimum Wage*)
See MINE. 1. 497

—— —— s. 1 - - - - - - 461
See MINE. 2.

2 Geo. 5, c. 3, s. 4—*Shops* - - - 491
See SHOPS.

2 & 3 Geo. 5, c. 8, s. 2—*Finance* - - 178
See REVENUE. 6.

2 & 3 Geo. 5, c. 20, s. 7—*Criminal Law Amendment* - - - - - - - 386
See CRIMINAL LAW. 5.

1913.

3 & 4 Geo. 5, c. 27, s. 7—*Forgery* - - 209
See CRIMINAL LAW. 3.

3 & 4 Geo. 5, c. 37, s. 27—*National Insurance*
See COUNTY COURT. 2. 352

STOCKBROKER.
See under BROKER.

STRANGER—Distress—Rent—Exemptions—Goods of stranger—"Goods comprised in hire-purchase agreement" - 132
See DISTRESS.

STREETS—Income tax—Expenses of paving street—Interest thereon—Deduction of income tax—"Yearly interest of money" - - - - - - 883
See REVENUE. 1.

STREETS—*continued.*
—— Land adjoining street—Insufficiency of fence—Use of land for purposes causing inconvenience or annoyance to the public—Jurisdiction of justices - 85
See LOCAL GOVERNMENT. 2.

SUICIDE—Attempted suicide—Whether punishable with hard labour—"Attempt to commit felony" - - - - 107
See CRIMINAL LAW. 1.

SURRENDER—Tenancy, Surrender of—Tenant remaining in possession—Execution—Claim by landlord for rent - - 469
See LANDLORD AND TENANT. 6

TAXATION—Costs.
See under COSTS.

—— Solicitors' costs.
See under SOLICITOR.

TAXES.
See under REVENUE.

—— Rates.
See under RATES.

TENANT—Landlord and.
See under LANDLORD AND TENANT.

TENANT FOR LIFE AND REMAINDERMAN—Will—Deer in a park—Consumable things—Validity of gift over - 486
See WILL.

THAMES—Sanitary authority—Sewage flowing into Little Creek—Part of or tributary of the Thames - - - - 916
See LOCAL GOVERNMENT. 3.

THAMES CONSERVANCY ACT, 1894, ss. 90, 94 - - - - - - - 916
See LOCAL GOVERNMENT. 3.

THIRD PARTY—Application by trustee against—No committee of inspection—No sanction by Board of Trade—Bankruptcy—Practice - - - - 701
See BANKRUPTCY. 7.

—— Workmen's compensation — Industrial disease - - - - - 213
See EMPLOYER AND WORKMAN. 6.

TRADE—Income tax—Profits of trade—"Fair and just average"—Deductions—Land owned by trader - - - 21
See REVENUE. 3.

TRANSFER—Bankruptcy—Insolvent traders—Transfer of business to private company—Shares and debentures—Bona fides—Approval of majority of creditors—Defeating or delaying creditors—Fraudulent conveyance—Act of bankruptcy - - - - - - 694
See BANKRUPTCY. 4.

TRIAL—County court—Action tried by jury—Verdict and judgment for plaintiff—Application for new trial on ground of no evidence—Power of county court judge to grant new trial - - 448
See COUNTY COURT. 1.

TRUSTEE—Income tax—Foreign possessions—Property settled on infants — Maintenance and education—"Uncontrolled discretion" of trustees - - 643
See REVENUE. 2.

TRUSTEE IN BANKRUPTCY.
See under BANKRUPTCY.

ULTRA VIRES — Workmen's compensation — Appeal—Court of Appeal or Divisional Court - - - - - - - 257
See EMPLOYER AND WORKMAN. 8.

UNDEVELOPED LAND DUTY — "Dwelling-house" - - - - - - 627
See REVENUE. 8.

—— Person chargeable — Owner for the time being—Purchaser in possession before execution of conveyance - - 327
See REVENUE. 9.

UNDUE PREFERENCE — Railway company—Undue preference by, of themselves as carriers — Legitimate competition — Through rate - - - - - 192
See RAILWAY. 2.

UNINCORPORATED SOCIETY—Action of debt against — Parties — Order authorizing one or more to defend on behalf of all
See PRACTICE. 3. 930

VAGRANCY ACT, 1898, s. 1 - - - 386
See CRIMINAL LAW. 5.

WAGES—Coal Mine (Minimum Wage) Act, 1912
See MINE. 1, 2. 461, 497

WEEKLY PAYMENTS — Workmen's compensation.
See under EMPLOYER AND WORKMAN.

WESTMINSTER — Metropolis Management (Battersea and Westminster) Act, 1887, s. 4 - - - - - - - 89
See LONDON. 2.

WHIPPING—Child—Conviction for larceny—Sentence—Power to order child to be whipped—Officer to administer whipping - - - - - - - 378
See CRIMINAL LAW. 2.

WILL—*Tenant for Life and Remainderman—Deer in a Park—Consumable Things—Validity of Gift over.*

Deer in a park do not belong to the class of things quæ usu consumuntur, and a gift of them by will for life does not confer on the legatee the absolute interest in them. In such a case the tenant for life is prima facie bound to keep up the herd, and deer purchased for that purpose and added to the herd become subject to the provisions of the will.

Maynard v. *Gibson* [1876] W. N. 204 followed. PAINE *v.* COUNTESS OF WARWICK. TYNDALE-WHITE AND ANOTHER, CLAIMANTS
Pickford J. 486

WILLESDEN URBAN DISTRICT COUNCIL ACT, 1903, s. 32 - - - - - 85
See LOCAL GOVERNMENT. 2.

WORDS—"Adverse claims" - - - - 545
See INTERPLEADER.

—— "Completion of execution" - - 70
See BANKRUPTCY. 5.

—— "Concurrent contracts of service" - 53
See EMPLOYER AND WORKMAN. 4.

—— "Dwelling-house" - - - - - 627
See REVENUE. 8.

—— "Expenses" - - - - - - 842
See REVENUE. 5.

—— "Instrument" - - - - - - 209
See CRIMINAL LAW. 3.

—— "Misconduct" - - - - - - 478
See LANDLORD AND TENANT. 1.

—— "New building" - - - - - 798
See BUILDINGS.

WORKMAN—Employer and.
See under EMPLOYER AND WORKMAN.

WORKMEN'S COMPENSATION.
See under EMPLOYER AND WORKMAN.

WORKMEN'S (CONSOLIDATED) COMPENSATION RULES, JULY, 1913, r. 44 (3.)
See EMPLOYER AND WORKMAN. 8. 257

BIBL.
LONDIN.
UNIV.

BRADBURY, AGNEW, & CO. LD., PRINTERS, LONDON AND TONBRIDGE.